UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case Nos. 08-13555(JMP); 08-01420(JMP)(SIPA)
- -x
In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.
Debtors.
- -x
In the Matter of:

LEHMAN BROTHERS INC.
Debtor.
- -x
United States Bankruptcy Court
One Bowling Green
New York, New York

October 21, 2010
9:33 AM

B E F O R E:
HON. JAMES M. PECK
U.S. BANKRUPTCY JUDGE

CONTINUED EVIDENTIARY HEARING re (i) Motion of Debtor to Modify the September 20, 2008 Sale Order and Granting Other Relief; (ii) Motion of the Trustee for Relief Pursuant to the Sale Orders or, Alternatively, for Certain Limited Relief Under Rule 60(b); (iii) the Motion of Official Committee of Unsecured Creditors of Lehman Brothers Holdings Inc., Authorizing and Approving (A) Sale of Purchased Assets Free and Clear of Liens and Other Interests and (B) Assumption and Assignment of Executory Contracts and Unexpired Leases, Dated September 20, 2008 (and Related SIPA Sale Order) and Joinder in Debtors' and SIPA Trustee's Motions for an Order Under Rule 60(b) to Modify Sale Order; (iv) All Joinders Thereto and Related Adversary Proceedings; and (v) Motion of Barclays Capital Inc. to Enforce the Sale Order and Secure Delivery of All Undelivered Assets

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P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Be seated. Good morning.

MR. GAFFEY: Good morning, Your Honor.

THE COURT: Let's proceed. I assume everybody got through security who needs to be here.

MR. GAFFEY: It appears at our table anyway, Your Honor.

THE COURT: Okay. Fine. It was a busy morning out there.

MR. GAFFEY: I was towed to the end of the line but I fought my way in. Good morning, Your Honor. The way we propose to proceed this morning is we divided the time up amongst the movants and I think my presentation will go about an hour and a half; Mr. Tecce, perhaps around forty minutes; Mr. Maguire, thirty to forty minutes. And there's some time built in there for rebuttal if we need it. We'll see. And I'd be remiss this morning if I didn't start this morning by on behalf of the movants thanking the Court and its staff for this significant investment of time in helping the parties to resolve their dispute. And we truly appreciate it.

As you know, Your Honor, we've had thirty days of evidence in this case and the case has been heavily briefed. And it all boils down at the end of the day to some main points. As we showed in our motion papers, we explained that

our Rule 60 motion, the movants' Rule 60 motions, and the concomitant claims under the Bankruptcy Code that the movants are asserting here as well are supported essentially because the Court was never told about billions of dollars in unauthorized and undisclosed transactions that were concluded but never told to the Court as part of the process for approving the sale.

Respectfully, we submit that the movants have proven each and every one of those claims, both the Rule 60(b) based claims and the concomitant claims under the Bankruptcy Code.

I thought it'd make sense at the outset to review somewhat the 60(b) framework in which we're approaching this case. Rule 60(b) provides for relief under a variety of circumstances. It may include mistake, inadvertence or surprise; newly discovered evidence; fraud or misrepresentation whether that misrepresentation be intentional or an innocent misrepresentation -- there are two prongs for that portion of the rule in 60(b)(3); fraud on the Court under 60(d); and any other reason that justifies relief. And we would submit that the evidence that has been introduced at this trial supports the 60(b)(relief) that we seek on any one of those bases.

Now, the remedy that we ask for is, under our bankruptcy claims, the turnover under our Code claims, our 549, our 550 claims and the other similar claims that the other movants have asserted. It's the turnover of all assets that

were delivered to Barclays over and above the balance of transaction that we assert was the basis of the Court's approval, that was described to the Court that was the basis of the agreement. And our experts have quantified that in the range of thirteen billion dollars. I'm not going to spend a lot of time today on valuation because that is a part of the case that's been very recently tried and was thoroughly discussed at the in limine motion. But the disclosure issues are something I'm going to address in some detail.

We believe that in this trial there was pervasive evidence that, in essence, one deal was disclosed to the Court while another deal was actually closed. The deal that was disclosed to the Court was a balance deal, a deal in which there was an equivalent exchange of assets and liabilities and ultimately, as described by Mr. Miller to the Court, would have resulted in a net benefit to the estates of approximately 1.8 billion dollars.

The deal that was actually closed, as opposed to disclosed, was the deal that Your Honor heard about from Mr. Diamond and from Mr. Varley. That was the deal that incorporated as a precondition without which Barclays would not have closed, an asset/liability mismatch where the assets exceeded the liabilities so that Barclays would have an embedded first day gain, a buffer.

Now there has been a lot of testimony to Barclays'

side of the case concerning the amounts of assets that were transferred over. And I think an underlying theme of that defense was essentially to suggest there or to argue that there was a wide range of possible assets that could have been transferred over, that reasonable people could say it was forty-five billion. Other reasonable people could say it was fifty-five billion and that there was no degree of precision possible with regard to the assets that Barclays received.

On the disclosure front, which is what this case is really about, nobody ever said that to the Court. The Court was given figures in response to its own questions about what the deal was worth. The Court was given values and a basis for those values. The value was book value; that's the value that was in the asset purchase agreement. And at the end of the day, however, Barclays approaches this on the grounds that there's some sort of economic value which translation is liquidation value. It's a bulk purchase with a discount taking into account their own concerns, subjective concerns about the value of the collateral. That is not the deal that was described to the Court. It is not the deal that was disclosed. By the time the deal actually closed, it bore new or no relation to what the Court had been told.

The deal started out on a -- this is what the Court was not told in sum. The deal started out on a false premise. The Court was told in the asset purchase agreement that what

was being transferred to Barclays was approximately seventy billion dollars book value as of the date hereof. Your Honor has seen page 6 of the asset purchase agreement maybe a hundred times during this trial. There's no doubt that that was meant to be Lehman book value and there's no doubt now, I believe, after the proof that Your Honor has seen in this trial, that was simply false; that was not true. It was not Lehman's book value. It was a lower negotiated value. It was a discounted from Lehman's book value. That's established.

The Court was told that Barclays would assume 1.5 billion dollars in liability for cure amounts. That was not true. The proof at this trial has demonstrated that Barclays never intended to pay anything close to 1.5 billion. Its internal calculations put that in the 200 million dollar range. The Court was told through Section 9.1(c) of the asset purchase agreement that Barclays would pay two billion dollars in bonuses to transfer any Lehman employees as part of the assumed liabilities, as part of the consideration in the transaction. That was not true. Barclays' own internal valuation showed they never intended to pay more than 1.5 billion dollars in bonuses. And in the event, that's about what they paid.

While the Court was told about a balance deal, the one that would generate a net benefit to the estate, in fact, it was a deal structured to give Barclays an immediate undisclosed multi-billion dollar windfall gain. The Court was not that by

Thursday of the week, of the week of September 15th, the APA had essentially been abandoned and the deal was now centered on the repurchase agreement, the Lehman/Barclays repurchase agreement, when Lehman -- when Barclays "stepped into the shoes" of the Fed. The Court was never told anything about the valuation of the collateral of the repo and, in particular, the Court was never told that the repo collateral was valued at liquidation values. In fact, what the Court was told was that the deal on the table was meant to avoid that very thing, the sale of assets by Lehman at liquidation values. In fact, that's exactly what happened and nobody ever said a word to the Court about that. The Court was never told about the addition of billions of dollars of assets in what we call the Friday asset scramble. Not a word about that was mentioned later that same day at the sale hearing.

The Court was not told that the clarification letter, when it reached its final form, accomplished that transfer of additional billions of assets, amended the asset purchase agreement that had been in front of the Court and, through maneuver in paragraph 13, retroactively terminated the termination of the repo which led to the evasion of Section 559 of the Code. One of the reasons we believe the Court was not told that is if the haircut had to be paid back into the estate under Section 559, that would have required the parties to come back and make disclosure and seek the Court's approval and they

never did. The Court never saw the clarification letter before it was signed. The Court never saw the clarification letter before the sale order was issued. The terms of the clarification letter were never disclosed to the Court.

The Court was never told about the Fed take-out agreement. The Court was never told that from the very beginning of the week, before the asset purchase agreement was even submitted to the Court before the sale motion was even made before a scrap of proof had been put into his Court as part of the 363 approval process. The Fed had already reached an agreement with Barclays which, among its other features, gave Barclays an option to purchase the repo collateral in the Fed repo for the amount the Fed had advanced. In other words, the haircut was already baked in for Barclays. The Court was never told that, in essence, the Fed traded its support of the transaction in a quid pro quo in return for Barclays' agreement to take the Fed out. The Court was told in this hearing over and over again by Barclays' executives that this process of Barclays stepping into the shoes of the Fed was the result of Fed pressure, the Fed made us do it. You heard that from executive after executive of Barclays. But when Shari Leventhal took the stand from the Fed, the Court asked exactly the right question and asked if the Fed had pressure to encourage Barclays to do that and her answer was a stark no.

There's no disclosure of any of these things and one

fundamental reason there was no disclosure of any of these things is the lawyers who were making disclosure to the Court were not clued into them. The Court heard testimony over and over from Mr. Miller, from Mr. Lewkow, the lawyers were not involved in the valuation of assets. None of the lawyers even knew about the role of the repo until the Saturday after the closing. The lawyers were kept in the dark about these material undisclosed issues. And hence, they were disabled from making disclosure. We do not -- no movant points at any of the lawyers who sat at these two tables and says they made a deliberate misrepresentation to the Court. You can be the best bankruptcy lawyer in the United States. But if your client doesn't tell you the facts, he cannot disclose them to the Court. You can be the best M&A lawyer Cleary Gottlieb has to offer, but if you're negotiating a deal and nobody tells you the economics, you're not in a position to cause disclosure. It was not the lawyers; it was the businesspeople who caused these fundamental lacks of disclosure to the Court.

Now, another theme that has pervaded Barclays' presentation arises from the fact that it was the only bidder, a phrase Your Honor has heard a lot, and the volatility of the markets and the extreme circumstances in September of 2008 under which this transaction was addressed and approved. We all know what that was like. Even now, after thirty days of trial, I don't think I have a -- I could have a perfect sense

of what it was like in the hearing. I was not there. But having reviewed all of the record here, I have a good sense of how urgent it was. And Barclays' opposition to these motions is based in part on the suggestion that when times are that hard, when the numbers are that big, when the stakes are that high and when the pressure is on to do things quickly as all parties asked the Court to do, that for some reason, the disclosure obligations under Section 363 -- and this is a court of disclosure -- the disclosure obligations under Section 363 should somehow have been relaxed, that a failure to make disclosures should retroactively be forgiven, that a failure to tell the Court the real numbers should not be the basis of 60(b) relief because, at the end of the day, Barclays wants to say no harm no foul. They just won't phrase it that way.

I would suggest exactly the opposite is true, Your Honor. This is a court of disclosure. When the stakes are high, when the circumstances are important, when the Court is asked to consider a transaction this large and this critical and this complicated on a schedule that short, that's where the rubber hits the road and that's where the disclosure obligations are enhanced not diminished. It's critical -- it is critical for a proper application of Section 363 and to protect the integrity of the process before the Court both for the Court, for the interested parties and for the public that under those circumstances, everyone has to step up their game

and everyone has to make sure that the Court is told everything it needs to be told to make an informed decision. That's not the time for slippage.

Now, a topic like that actually came up at the hearing on the 17th; that's the sale motion hearing, the first time the parties came to the Court with the sale motion. And Your Honor may recall when Mr. Despins, who was counsel for the creditors' committee at the time, in the context of asking for a short adjournment or asking for some sort of relief as to the process regarding the DIP financing, said well, if anything goes, Your Honor. And the Court stopped him right there. And the Court told every party how this was going to proceed. And this is what the Court said: "I totally disagree with that assertion. We are not in an anything-goes environment. We are in an environment in which we're seeking to fit the exceptional case within the standard framework that we're all familiar with of due process, Bankruptcy Code, bankruptcy rules, the local rules and accepted practice in this court." So lest anybody needed warning that that was the standard, the Court gave that warning. Unfortunately, the involved parties disregarded the warning. And unfortunately, in fundamental aspects, there was serious failures of disclosure in support of the 363 relief that the parties sought here.

Barclays is not entitled and was not entitled at the time to sit back and watch the deal being mis-described and

later claim the finality of 363 protection. There is a price to be paid for that. The price to be paid for 363 protection is full disclosure. Barclays conceded at the trial -- Your Honor may remember during the opening, Mr. Boies suggested that Barclays did not have a speaking role in this play. They most certainly did. They spoke. They participated in the drafting of the sale order. And they knew the facts that were not disclosed to the Court. They can't enjoy finality under 363. And equity says they can't enjoy the loophole fruits of those failures of disclosure.

Now I mentioned one of the disclosures and I want to address some of the particular failures now. And one of them is the disclosure to the Court and the description to the Lehman board of this deal as a wash. In fact, we believe it was told to the Court there would be a net benefit to Lehman. But the board -- the board of Lehman was told this would be a wash as to the assets of LBI. Your Honor will recall these minutes. This is Exhibit M-9 in evidence. It's the final minutes of the meeting of the Lehman boards on the morning of September 16th before the asset purchase agreement was finalized, before it was agreed, before it was brought to the Court. And the board was told the deal was described as a wash, a wash, with Barclays assuming liabilities, including employee liabilities and contract cure amounts, basically the equivalent to the assets. That's the deal that was described

to the Lehman boards. That's the deal the Lehman boards approved. We put Michael Ainslie, the chairman of LBHI's board and member of the board at the time, on the stand and he confirmed this. Mr. Ainslie was asked to describe his understanding and his understanding was "It was a transaction where the assets and the liabilities were equal."

Your Honor will also recall, on a review of M-9, on a review of the board minutes that another attendee of that board meeting was Barry Ridings from Lazard. Mr. Ridings laid out the standard that Lehman had to meet for the Court to approve a 363 sale. And he told the board that it had to be better than liquidation -- better than liquidation. And that's a theme that Mr. Ridings took up later in his deposition which was played to Your Honor. It had to be better than liquidation.

So what does the Lehman board think? The Lehman board approves a wash, an equal exchange of assets and liabilities with values that are better than liquidation. The financial schedule on which the deal was originally based -- and Your Honor is familiar with the famous M-2 as well. It's a balanced financial schedule. It's a balance sheet. It balances the assets and the liabilities. And it does that with the numbers for assumed liabilities at cure and comp for 4.25 billion dollars. That brings it into balance. Now the evidence at the trial showed that those numbers were, in reality, plug numbers from Barclays' perspective but had no intention of paying

anything resembling that amount. But that is the document upon which the deal was based. Mr. McDade told us that. We asked Mr. McDade at the trial about that document. And this is what -- when I asked if it's fair to say these are the numbers upon which the deal was based, he said yes. And he described it as the guidance document used for the first hearing in the courtroom. And elsewhere in his testimony, he described it as the guidance document for the lawyers and the advisors and everyone else involved in the deal. Participants, advisors and lawyers were to be guided by this document.

Now, Mr. McDade, Lehman's chief negotiator -- and I would submit a credible witness, one of the few witnesses not aligned with the party anymore -- could not have been clearer in his testimony that the sale transaction overall was to be an equivalent exchange of assets and liabilities. I asked him that: "On the 16th when the agreement was signed, did you consider the transaction an equivalent exchange of assets and liabilities?" His answer: "Including all of the value that was contemplated, yes, approximately." That remained Mr. McDade's view all week. That's not just his description at the beginning. That was Mr. McDade's view at the sale hearing where he was a witness. He told us his view never changed over the course of the week. In his mind, this deal was always an equal exchange of assets and liabilities. He told us the assumption of liabilities was integral to that balance. He

told us when he took the stand to testify about this, as Lehman's witness when he sat in that chair, he made that representation to the Court. Your Honor may recall that interplay where there was an objection over the use of the term "representation" to the Court. And we all affirmed that was Mr. McDade's view of what he represented to the Court. It was a balanced deal.

Now, Barclays has, from time to time, said it's not a balance sheet deal relying on what I would respectfully call a little bit of word play from Mr. Miller's deposition. It's actually in the question not in the answer. Mr. Miller was asked, could you do this deal irrespective of the value of liabilities and he said essentially yes. That was never his client's view. His client said to us you can't do it that way. You can't do it irrespective of values. I asked him that.

Following on his testimony about the equivalent exchange, I asked, "So the deal couldn't be done irrespective of the value of those liabilities, correct?" "That's correct." " So the deal that you agreed couldn't have been done irrespective of what the value of the assets was, is that correct?" "That's correct." Mr. McDade's testimony resoundingly refutes any suggestion that this deal was supposed to be irrespective of what the values were. Simply to state the proposition in a bankruptcy court is to show how ludicrous it is. If the deal was irrespective of values, if it didn't

matter what Barclays was going to get, why have the hearing at all? And if it was a deal irrespective of the values Barclays was going to get, when the Court asked how do I value -- how do I value this transaction, you would have thought that is the answer the Court would have been given. But nobody said anything like that to this Court at any point during that week. It would have been easy to say and nobody ever said it. And the reason nobody ever said it is it wasn't the deal.

Mr. McDade also told us he was never told anything -- anything to indicate it was a precondition for Barclays that it have a first day gain. And he rejected any notion that Barclays would have such gain. I asked him, was it contemplated that there was a gain to Barclays and he said no, it was not. I asked him again, the all-in deal, was there an embedded gain from Barclays on day 1. He said no, it is not.

Your Honor, I'm going to ask Mr. Kirpalani to move his head away from my page numbers, if that's okay.

Your Honor will recall, I showed Mr. McDade a balance sheet, an opening day balance sheet that was prepared by Martin Kelly that showed 3.38 billion dollars in equity for Barclays on day 1. And I asked him if that was consistent with the deal he made and he said no, it was not. Mr. McDade resoundingly rejected the notion that a first day gain for Barclays was disclosed or was part of the deal. It was a balance deal. There should have been no such gain for Barclays.

When the Court asked Mr. Miller how to value the overall transaction, and this is the section of the September 17th transcript with which we're all very familiar, Mr. Miller gave these numbers. Mr. Miller talked about, among other things, the assumption of liabilities of approximately four billion dollars and 250 million in cash. And that, coupled with the APA, gave the Court the impression this was a balance deal or one that would generate a net benefit for Barclays (sic). Not a word about it being a precondition for Barclays there was a first day gain. Not a word that this was irrespective of values.

Now, I guess the term "precondition" -- that's not my term. That's the term of Jonathan Hughes. Jonathan Hughes was at the time the general counsel of Barclays. He was the man responsible for marshalling their legal forces to bring this deal to court. He was in on the negotiations from start to finish. And he described a first day gain as essentially a precondition. Essentially a precondition. Mr. Hughes conceded nobody ever specifically mentioned that. Mr. Hughes conceded nobody told it to Lehman. And Mr. Hughes conceded that nobody told it to the Court. Mr. Hughes conceded, when I asked him if anyone had told that to the Court in any way, shape or form that he didn't think it was said. Any way, shape or form. The general counsel of Barclays conceded.

The general counsel of Barclays also gave us the

formulation for Barclays' idea of disclosure. This is what Mr. Hughes said: "There were other pieces of information from which one might have been able to deduce a first day gain for Barclays" -- "other pieces of information from which one might have been able to deduce a first day gain for Barclays". Most respectfully, Your Honor, I suggest that that standard of disclosure is anathema to a 363 sale. It is just not enough to argue that there were clues left around to solve the mystery, that there was a trail of bread crumbs that had the Court been inclined could have led it to the conclusion there was a windfall gain for Barclays. It is just not enough to say the Court could have figured it out, it could have deduced it. That is not disclosure. That's standing silently while this mis-disclosure is made, comfortable somehow that a record is being made that you can argue later that there were pieces of information from which one might have been able to deduce something.

I asked Mr. Diamond about capital accretion about this first day gain. And Your Honor will recall Mr. Diamond's testimony. It was a difficult couple of days. Mr. Diamond was hardly a forthcoming witness. When I showed him his deposition testimony in which he had said that "an asset/liability mismatch was necessary or we weren't authorized to do the deal" -- those were his words -- "we weren't authorized to do the deal", Robert Diamond, the president of Barclays, an

articulate man, who deals with boards all the time and is a member of the Barclays board, had this to say: " I think I probably misused the phrase 'authorized'". When I asked him about it again, Mr. Diamond wanted to add a couple of caveats to his deposition testimony.

The fact of the matter is when you cut through it and you cut through what Mr. Diamond had to say and when you cut through what Mr. Varley and Mr. Hughes had to say, there's no doubt Barclays knew it would have a first day gain, Barclays considered it a condition of the deal, Barclays would have walked away from this deal if they didn't have it. And there's no doubt, because the record speaks for itself, nobody ever said that to this Court, not one time.

The idea of capital accretion from Mr. Diamond stayed in the deal from beginning to end. That's what he said.

Now, Mr. Varley testified -- Diamond's boss, John Varley, testified, Mr. Varley being chief group executive of Barclays. And he was fixated on this asset/liability mismatch. That's the term that he used. And one thing about Varley's testimony that I think is very important is his discussion about the so-called buffer. Your Honor will recall because we've seen it time after time -- so many times, I don't even have it on a slide -- the analyst call. The analyst call which talks about a spread between the long and the short position of seventy-two billion and sixty-eight billion. And Barclays

tried to make this Court think in this trial that that's where the asset liability mismatch solely resided and that apparently is one of the pieces of information from which the Court might have been able to deduce Barclays' first day gain. Well, Mr. Varley conceded that that's only half the buffer. That's only half the buffer. Mr. Varley conceded that the seventy-two they started out with was a result of the marking process. The marking process is the process Your Honor heard about time and again through the trial of the traders for Barclays and the traders for Lehman sitting in a room and negotiating what the price should be, what the value should be, what led to the discount, what led to the valuation below Lehman's book value. And they got to a range of seventy-two. So when you start with the seventy-two/sixty-eight that Barclays puts most of this disclosure to -- it's the basket which Barclays puts most of its disclosure eggs. It has to be taken with Mr. Varley that it started out already cut. It started out cut from Lehman's book value to the seventy-two at which that spread between the long and short position started.

Mr. Varley made clear it was his obligation to deliver that form of capital accretion to the board. So where are we? The Lehman board approves a wash. The Court is told there's a net benefit to Lehman. The Barclays board insists on capital accretion. Diamond at least admits it's a priority. At his deposition, at least, he admitted he didn't have authority to

do a deal without it. And Varley tells us there was already a mark-down baked in to the spread that they say was disclosed to the Court. The parties made two different deals apparently. Lehman made a balance deal. McDade negotiated a balance deal. McDade says that's what this Court was told. That is what this Court was told. And below the disclosure, below the line of disclosure, a deal with a built-in gain for Barclays is actually being negotiated from the very outset. And what that deal contemplated from the outset was the five billion dollar discount. The five billion dollar discount. That was agreed from the very beginning.

Now, the use of the term "book value" in the APA was a deliberate choice. Your Honor will recall it was written in by hand in the last draft. If the Court were to take a look at the first exhibit of both parties, BCI-1 and M-1, you'll see that typed in. But this is where it came in. This page is taken from the copy of the asset purchase agreement that was annexed to the sale motion. It was added in as a deliberate choice. And we know now from the trial how it was added in; Barclays chose that term. Barclays chose that term. Mr. Lewkow told us that Barclays chose that term. On direct, when Mr. Schiller was questioning him, Mr. Lewkow said that the term "marks" which was at one point in the draft was considered not precise enough. Book value was going to be substituted instead. And when I asked him at the trial where that came

from, he said, I think it was me. I think it was me who decided we should use the term "book value".

The use of that phrase "book value" is just not true. Barclays can't decide in this case with regard to the discount from book value whether it wants to embrace it or shoot it. They put witnesses on the stand who will admit, who say, Lehman's marks were stale. They needed to be remarked. Lehman's marks were old and too high. We had to negotiate a different lower value for them to be realistic, to use Mr. Varley's words.

And then they put Mr. Pfleiderer on the stand to try to make it disappear entirely through a review of the GFS reports. The fact of the matter is every witness involved, every witness who was there at the time, admits there was a discount from Lehman's book value. We're all too familiar with Mr. Kelly's memo where he talks about the five billion dollar all-in economic loss versus our marks. And Mr. Kelly writes this memo at 5:10 a.m. before the board meeting, before the APA had been drafted and certainly before the sale motion. It was baked in and built into the deal from the very beginning. Barclays has admitted -- Barclays has admitted the discount. These papers in this case. In its opposition motion, Barclays attempts to explain it here saying the Lehman marks were stale and overstated. Barclays didn't agree with them. And it didn't want to accept those marks and then have to take an

immediate write-down after the sale. Thus, the discount described throughout the movants' Rule 60 motions is not a discount from fair market value but rather an attempt to adjust from stale Lehman marks to fair market value. Well, that, to me, admits that it wasn't book value. It wasn't book value as the APA said it would be. It was not book value as Mr. Lewkow had chosen to say in the APA.

Barclays admits the discount. And let's go back to the disclosure point. If in fact, as Barclays seems to say and as the witnesses have asserted at the trial, Lehman's marks were stale, Lehman's marks were too high and what the -- the others that were actually being given to the Court were a negotiated amount, whatever the reason, to exceed to Barclays' view that this was a more realistic assessment of market value because it was the deal at which Barclays would transact. Whatever the reason, that needed to be told to the Court. But the Court was never told that. Instead, the Court was told it was book value which any Barclays witness will tell you was viewed by the world to be too high. Well, if that's true, when the Court and the public was told this deal was being done at book value, the information given to the Court was that Lehman was getting, in essence, the benefit of its higher values even if they were stale, even if they were high. The point is the price really wasn't disclosed. One deal was disclosed; another deal was actually transacted from the very beginning. From the

beginning, the idea was to deliver the securities assets to Barclays at five billion below Lehman's marks.

The notes of John Varley, in his own deal file reflect this. Your Honor will recall this page from Exhibit M-12. That's what Mr. Varley called his hand files, the file he kept in his office on important issues about the deal. He records the negotiated discount. Barclays' minutes talk about assets of forty-five billion liquid, thirty billion less liquid. Seventy-five billion not seventy. Barclays' internal documents at the time, even for tax planning -- and here, I'm looking at Exhibit M-31 -- talk about the valuation calculations that the discount between the value of the assets acquired and the purchase price not be subject to a marginal tax rate. Mr. McDade testified this was a negotiated number. Mr. McDade testified that the negotiated number was five billion off of Lehman's marks. It was in the range of five billion dollars.

Now Mr. McDade also conceded and Mr. Lowitt, the CFO, conceded that a negotiated price for both assets with a single purchaser just was not the way any regulated broker-dealer would keep marking market books. This could not have been Lehman's book value. Here's Mr. Lowitt on the topic. I asked, "You've never seen that type of process used to truthfully describe, to correctly describe this book value at all, have you?" His answer, "Yeah. I'm not aware of a comparable situation to this." He said it again when I followed up, "I

would not have thought that going to one outside party and saying what do you think these assets are like would be the normal process of how we would establish our books and records for marking." The CFO of Lehman agreed -- who now works for Barclays -- agreed that that wasn't book value. It couldn't have been book value. It was the result of negotiation with a single purchaser.

Mr. McDade plainly testified that the price to transact was not Lehman's book value as of the 16th of September. "Is that right?" Answer: "To the best of my understanding." And that question and answer follows obviously the Q and A above it where I'm asking him about this process, this negotiation process between the traders. Whatever it was, it wasn't book value as of September 16th. Whatever it was, it wasn't book value as of the date hereof as the asset purchase agreement said.

Now the testimony was also clear there was a plan at the beginning of the week to mark down the books. Kelly and Lowitt both told us that. Kelly, of course, confirms his calculation of the loss against the books here in his handwritten notes. He put it at five and a quarter billion dollars. He, too, told us about the five billion dollar difference: "Lower than their most recent book values on the books of Lehman." And his notes confirmed that it was the plan to mark the books down, to mark the books down to reflect that

lower negotiated price. Your Honor is going to remember this from the trial. Mr. Kelly was shown these notes where his handwriting says "Marking book down". Mr. Kelly was shown his deposition testimony where he described why he wrote the phrase "Marking book down". And Mr. Kelly simply lied. Mr. Kelly took that stand, took the oath and made false statements to the Court about what his handwriting said. The plan was marking the book down. Martin Kelly was involved in that plan. But we don't have to just rely on him.

Mr. Lowitt also made notes about a markdown.

Let me get the bigger one of that.

This is our merely draft of the 9/16/08 balance sheet. And that's in Lowitt's handwriting, "Markdown", just below 77.4. And Your Honor will recall that both Mr. Kelly and Mr. Lowitt each in their separate appearances on the stand had something of an epiphany about this. Both of them suddenly remembered for no apparent reason that it was the books of September 12th they were talking about. Kelly was particularly memorable about that because he told us it had nothing to do with the fact that he was going to testify. And he was pretty clear it had nothing to do with his preparations to testify. And Lowitt also told us that it had always been his view he was just trying to be a bit more precise than he had been at his deposition. They bought into the theory and they came in and they sculpted their testimony to say it as if the difference

between marking down the 12th or marking down the 15th makes any difference at all. Mr. Lowitt -- Mr. Lowitt himself conceded that no matter how you look at it it's lower than Lehman's book value, no matter how you look at it. And Mr. Lowitt also conceded the plan was from the outset to mark the books down. I understand there was going to be an exercise to mark the books to reflect the agreements between Barclays and Lehman. They were going to mark the books down. Now, we know, later, whether they actually took pen to paper and marked them down on that day, turns out to be either unnecessary or irrelevant because the repo presents the opportunity to achieve the same thing by a different method. But that was the plan at the beginning of the week and it was a negotiated price because Barclays had insisted on it.

And what's Barclays' disclosure here? Again, we turn to Mr. Hughes. Mr. Hughes tells us despite the testimony of Mr. Lewkow, his lawyer, that the term "book value" "wasn't of great consequence at the time as far as I recall". It wasn't of great consequence to Barclays."

Well, perhaps that explains why Barclays sat silently their lawyer having put the term "book value" in the agreement, the agreement having been submitted to the Court and let the Court think that Lehman was getting the benefit of its allegedly overstated and stale marks. But one more time, this is indicative of Barclays' disdain for the disclosure

obligations in a 363 sale. It just didn't matter to them. It didn't matter to them because they got the deal they wanted. They insisted on lower values in the marks showed they got it. And they really didn't care if the Court was told about it. They just wanted to rush to approve it. The fact remains, that's what the APA said. Barclays chose that term. That term was false. The price was not Lehman's book value. It was a negotiated lower price.

Now, that's how the value to Barclays was understated. The consideration Barclays was going to pay was also overstated. And that fell in two categories. And again, I'm at the beginning of the week, the assumption of liabilities for cure and the assumption of liabilities for comp. The original calculation for cure, Your Honor will remember from our friend, Exhibit M-2, is 2.25. That number dropped. We all agree that number dropped as -- sometime between the 16th when this was prepared and the 17th when Mr. Miller came to the court. But we know where that number and numbers like it came from. They came from transaction adjustments that Martin Kelly and his staff made in which they were writing up Lehman's accruals. Here's some examples. Your Honor will recall these transaction adjustment sheets. There's M-32. That's them on September 18th, the day before the sale hearing. There's Exhibit M-17. That's done on the 17th, two days before the sale hearing. Now Barclays had one copy of this and I'm sure they'll show it to

you where a copy of a transaction adjustment page went to Weil Gotshal. There's not a scrap of evidence in this record -- there's not a scrap of evidence in this record that anybody explained it to Barclays -- I'm sorry -- to Weil Gotshal. There's not a scrap of evidence in this record that anybody ever took one of the disclosing lawyers aside and said look, Harvey, before you tell the judge what an assumption is for cure, for contract, you should know these numbers are just estimates. These are just the range. We're actually writing them up to agree with the value sheet. We're writing them up to agree with the purchase agreement. They are not real. Nobody ever told Mr. Miller or anybody else either that it was never Barclays' plan to pay those amounts. This is, in fact, what the Court was told about the assumed liabilities. That page is page 6. It's Exhibit M-18 of the sale motion. This is the first time the Court is asked to consider approving the 363 deal. The parties estimate that the cure costs associated with such assumptions and assignments will be approximately 1.5 billion. No qualification. No suggestion, as Barclays has made in this trial, that it was a range that could have been from zero to infinity. Nobody really knew what the number was. That's what the Court is told. And Mr. Miller also said it. When the Court asked what the value of the transaction was, this is what Mr. Miller said about cure. "[T]he cure amounts and other payments in connection with the contracts, are

estimated to be a billion five hundred million dollars." No qualification. No suggestion that anybody had told him these were written up. No suggestion anybody had told him these could be a broad range. They could be zero; they could be 200 million; they could be 1.5. Nothing like that. Over and over, the lawyers told us they weren't privy to these numbers.

And throughout this trial, we saw proof that that was never Barclays' plan. It was never Barclays' plan to pay anything near 1.5 billion dollars. They were thinking more in the range of 200 million dollars. These are -- in Exhibit M-11, these are Mr. Cox's handwritten notes where he refers to 200 million for 2000 contracts that are mission critical. And where does he get this information? It says it on his notes: Martin Kelly. And Mr. Cox didn't remember on the stand where he got that. But that's what his note said at the time. His contemporaneous note suggests that it was Martin Kelly who told him we'll only have to pay 200 million. And in any event, those were Barclays' internal calculations. 200 million for external funding.

This document, M-41, puts the total underestimate, the difference between what the Court was told -- what the balance sheet that the deal was based on required and what Barclays actually intended to pay at 2.7 billion dollars. That's Exhibit M-41. They put the difference at 1.3. The total negative goodwill generated by this practice is 2.7 billion

dollars into Barclays. No doubt Barclays was always planning to pay something in the range of 200 million dollars for cure in the event they paid 238 which itself is a telling fact. Court's told 1.5 billion; Barclays is in the 200 million dollar range.

Same problem with bonuses. Two billion dollars for bonuses. It says it right there in 9.1(c). Barclays has from time to time taken a stab at saying, well, the financial schedule is not the one referred to in Section 9.1(c) because it's only assigned by Mr. Berkenfeld. Well, Mr. Lewkow dispelled that motion and told us that's the one that's referred to in the agreement. And Barclays did not pay two billion dollars. Your Honor will recall the testimony of Mr. Exall, Michael (sic) Exall. And Mr. Exall generated during discovery in this case a chart that, by a remarkable coincidence, purports to show Barclays paid 1.999 billion. My partner, Mr. Hine, asked him, well, did you say to yourself, holy cow, I came in within one-tenth of one percent. And he said that wasn't -- that wasn't result oriented. But the internal documents show it most certainly was. Barclays knew -- it always planned a bonus pool in this kind of range. And here, I'm at Exhibit M-130. There we have a bonus pool of 1.3. That's on the 16th. As late as the 23rd, Barclays still has a bonus pool in the range of 1.4 billion dollars. But they knew the contract required a two billion dollar payment. There

are internal memoranda at Barclays about that very fact. Clackson to Ricci: "So it looks like we have to pay them two billion in bonuses." And look at the attachment slide. That's the balance sheet upon which the deal was based. That's the 9/16/08 balance sheet.

We all remember this e-mail, the one entitled "650 million dollar profit". Here we have Clackson, the CFO, writing to Evans. And he's complaining, "It says two billion 9.1(c) and you guys told me it was 1.35." And in the end, what do they do? They paid -- and I won't burden the Court with all the documents that support it. It's virtually undisputed. Barclays says in its papers they paid 1.55 billion dollars for bonuses.

Now Barclays says it's not two billion. Barclays has suggested that 9.1(c) and its obligations of the 9.1(c) somehow also cover other types of comps: severance, other bonuses. And the schedule that Mr. Exall relied on, both his original and his adjusted one, do include things for social taxes, for Barclays prices. 9.1(c) deals only with bonuses. The contract itself says it. 9.1(b) deals expressly with severance. 91.(c) deals with bonuses. 9.1(c) is the only one of the two of them that refers to that schedule. And in the record then -- I won't to put it up on the screen. It's the testimony of Alvin Brown, a partner at Simpson Thacher who represented Lehman and drafted that clause -- and his deposition testimony is in the

record. And it's clear that's exactly what that what that was meant to say, two billion for bonuses. Barclays paid only 1.5 and never planned to pay anything near two billion dollars.

I've mentioned a couple of times Barclays' idea of disclosure. And I wanted to turn to that just very briefly. I put out there Mr. Hughes' formula of pieces of information making it capable of deduction being the Barclays standard for disclosure. I'd like to briefly address the analyst call and just reaffirm some of the things that I think the testimony in this case shows. First of all, and most self-evidently, whatever it is the analyst call said nobody showed it to the Court. I asked Mr. Hughes, you may recall, was the Court invited to the analyst call. And he said, and I think he meant this as a jocular answer, I certainly didn't invite him. But the fact of the matter is, we know. The analyst call was not put in the court record. The press release that they also show us, also not put in the court record. Mr. Hughes conceded. He's general counsel of Barclays. He's the one who tells us that's a disclosure document. He didn't see it until he prepared for his deposition in this case. So, so much for the analyst call being disclosure. Even if it was a form of disclosure, it doesn't mention the assumption of liabilities for comp. It doesn't mention the assumption of liabilities for cure. It doesn't mention the initial discount. It discloses, at best, that one mismatch between seventy-two and sixty-eight,

seventy-two being the markdown book value against the sixty-eight. That's assumed. That is not disclosure. Disclosure is when your lawyer sits at this table and stands up and tells the Court something, when papers are filed with the Court. It is not a retroactive look at a press release that the Court might have seen or an analyst call the Court might have heard about. That's not even a poor excuse for disclosure. It's not disclosure at all.

So the repo -- let me move on to the repo, Your Honor. We know from all the testimony in this case that Barclays -- here's the phrase everybody uses -- stepped into the shoes of the debtor. Barclays will tell you it did that because the Fed made it do it. The Fed has told us that's not true. Barclays will tell you that stepping into the shoes of the Fed created terrible, terrible risk for Barclays. The take-out agreement between the Fed and Barclays shows that's not true. Barclays had an option. Other evidence demonstrates to us that the Fed was ready to step in, and in fact did, to finance the repo collateral for Barclays the very next day. Barclays could come right back to the PDCF window and put that collateral back to the Fed and receive overnight financing for it for a period they talked of about a month till Barclays could find private funding support. So the risk that Barclays says it took on is really not the risk that they did take on.

And all of that again is begs the disclosure point.

If what Barclays is trying to prove here is it had such serious risk because it stepped into the shoes of the Fed and the repo, what's their argument? Therefore, we should be forgiven for the lack of disclosure to the Court? It was such a risky deal for us, the standards should be lower? That doesn't make any sense. And that doesn't work as a matter of law.

It also doesn't work as a matter of testimony. Your Honor will recall I asked Mr. Varley if on the issue of a single bidder he felt that reduced Barclays' disclosure obligations. He was actually a little agitated at that point. He said, you know that's not my view. I asked that of Mr. Hughes. He said it was not. I asked it of Mr. Diamond. He said it was not. They'd have to say that. I also have to say it because it's true. The fact that Barclays may have had some risk because of the repo doesn't retroactively forgive a failure to tell the Court about the repo. The repo was the deal -- was the deal by Thursday and certainly, by Friday. We know this. We know that the Friday asset scramble was the result of Barclays complaining that the collateral and repo was too low. We know that the repo was the main topic of conversation between the parties. That can't reasonably be disputed.

And here's what we also know. Let me show you on a slide we collected here -- make sure I have the right one. Just so I'm clear on this, Your Honor, these are two extracts

from the -- and I'm at slide 120. These are two extracts from the September 17th transcript. One is from -- the first one at the top is from page 71. And the second one at the bottom is from page 24. Let me read them in page order. This is what Mr. Miller said: "And then, Your Honor, in the interim, LBI has entered into an arrangement with the prospective purchaser where there's a repo agreement in which they are backing up and allowing these repos to be settled and to be financed." And Mr. Miller said a little while later: "We have a company, Barclays, which is supporting the operations of LBI right now with a repo credit agreement so they can settle the transaction."

Your Honor, that -- those two sentences are the sum total of what this Court was told about the repo before it approved the sale order. That's it. That's all. Nothing in the sale motion. Nothing from the witness on the stand. That's it. Now how could that possibly tell the Court that the repo had become a central piece of the transaction. How could that possibly tell the Court that the values they were applying to the repo were going to be what was transferred to Barclays? The answer is it couldn't.

And just to reemphasize. On that -- there's nothing on the 19th. There's no mention of it. There's no witness put on the stand to talk about it. The Fed, which is here, gets up and says we support the agreement. Nobody sees fit to mention

that that's a trade for taking the Fed out of its repo liability. Nobody mentions that there were negotiations that very morning about the value of the repo collateral. Nobody says a word about that. Nobody says anything about the repo. Why? The lawyers don't know. No one has told the lawyers. Mr. Miller, Mr. Lewkow for both Weil Gotshal and Cleary Gottlieb, both were clear and unequivocal and unrefuted in their testimony that they weren't involved in the repo, they weren't involved in the valuation of the repo collateral. They knew nothing about this.

And there is a point later on the 19th where Your Honor asks Mr. Novikoff from Wachtell rises and he has a question about safe harbors. And one of the safe harbors, of course, is Section 559. And Your Honor inquires of Ms. Granfield from Cleary whether the safe harbors were affected by the transaction. I'm paraphrasing obviously. And she says no. The reason I raise that is I want to emphasize the point I just made. We do not intend that Ms. Granfield misled the Court when she gave that answer. She did not. She doesn't know either what's going on with the repo. The lawyers only find out the next day that the repo's been terminated. And it's not until the weekend that any lawyer sees any of the implications of Section 559. I have no doubt Ms. Granfield's answer was truthful. But I also have no doubt it was completely uninformed because the clients never clued the lawyers in. And

the repo, as we know from the proof in this trial, was the mechanism by which the original discount was delivered.

At the sale hearing, Ms. Fife gave the Court a report about changes in the deal since the Wednesday, since the 17th. And this is what she said. We've seen this a number of times in the trial, too, Your Honor. Ms. Fife says to the Court: "In terms of the economic changes, they result largely because of the markets, unfortunately. And from the time that the transaction was actually entered into till now, the markets dropped and the value of the securities dropped as well.

"So, originally, we were selling assets that had a value of seventy -- approximately seventy billion dollars." And that's a reference to the long position. Mr. Shapiro, who testified, said he viewed it as a corollary. "And today, Your Honor, we're only selling assets that have a value of 47.4 billion dollars."

So Ms. Fife comes to the Court and says the market's dropped. This is worth less. There's no other way to interpret that, especially balanced against the book value clause or the APA, than to say we use mark-to-market book value has caused this to reduce from seventy to 47.44 because of market value.

Now, Mr. Miller confirmed, as if it needed to be confirmed, that the lawyers had no information about how that 47.4 number was derived. He said it was given by

businesspeople at Lehman. So on the public record, the APA is still the operative agreement although it's not; now it's the repo. And the 47.4 given to the Court is a corollary to the seventy billion dollar long position but, in fact, it's a number that relates to the repo collateral. And I'm going to move on to how that was calculated.

But before I do that, I want to take note of the fact that Mr. McDade took the stand at the sale hearing and was asked on cross how the assets being transferred were valued. And he told the Court there was an individual line item detail, an individual line item detail processed through all of our individual list business units and coordination with the normal finance professionals who are incorporating into the valuation process. And he told Mr. Qureshi who was cross-examining him that that took place as recently as the prior evening. That was not true. That was not true because there was no line by line valuation of the collateral being transferred to Barclays. At best, it was done on an asset class basis. It was also not true because the suggestion of Mr. McDade's testimony was that this was done in Lehman's normal course the way it normally marked its books and record and that was not true. We know -- and I'm going to address this in some detail -- there was an exercise led by Jim Seery to apply liquidation values to the repo collateral. This was no true. Now I don't want to stand here and suggest Mr. McDade knew it wasn't true. I think he

didn't. Mr. McDade is locked in a room getting prepped with Mr. Miller who doesn't know his numbers. Mr. McDade is not involved in the nuts and bolts of this. I think Mr. McDade is testifying to what should have happened, to what normally happens. But whatever else needs to be said, it did not happen. There was no line by line valuation.

The Court was also told that what needed to be avoided here was liquidation values. In the sale motion, the parties said this: "It is urgent to sell the purchased assets now or face material disruption of their value. I asked Mr. Shapiro, who had reviewed this, what that meant, and he explained, it was to be sure -- because the absence of a sale would have led to a hear term liquidation. Mr. Ridings, whose deposition was played here by Barclays, said numerous times that the purpose of his proffer and testimony was to demonstrate it's better than liquidation. "It's the highest and best and only alternative we have." He said it more than once. It's better than liquidation because it was the only alternative was the deal on the table.

So the suggestion from Ms. Fife's statement to the Court about 47.4 because the drop in the markets coupled with urging of the Court to avoid liquidation price not only does not disclose to the Court that liquidation values were being used -- suggest to the Court that market values are being used, it never disclosed to the Court and lures the Court away from

the truth of the matter which emerged at this trial. The repo collateral that was transferred was valued at liquidation values.

Now we know that from the testimony of Jim Seery. We know the lawyers weren't involved in it. And I can keep harping on that but I don't think anybody's really going to dispute me on that. It was all done by the businesspeople. Now Jim Seery was the global head of fixed income at Lehman. That week, Mr. Seery was working on the assumption that he would move over to Barclays. Mr. Seery told us at the trial that when he got to Barclays, he received a bonus and a retention payment. He wasn't able to remember the amount but he was able to quantify it into the millions of dollars. Mr. Seery gathered traders together to look at the value of the collateral and the repo. He said on the first day of his testimony the purpose -- the primary purpose was to prepare Barry Ridings to get on the stand and show the liquidation value was the worst alternative to the sale transaction.

Just a quick word about the repo values. We know that the values of collateral held in the repo were valued by the custodial agent. The Fed repo, the one into which Barclays stepped, as it were -- the Fed repo, the repo collateral agent was JPMorgan Chase. They valued the Fed repo at 50.6 billion. The Lehman/Barclays repo -- that's the one that emerges on the 18th when Barclays steps into the shoes -- is valued by

Barclays' agent, Bank of New York. We know they're Barclays' agent because Mr. Ricci told us that. And they valued the repo collateral in the neighborhood of fifty billion. High bid, 49.9, forty-nine and change. Those are not liquidation values. Those are the values the custodial agent puts on repo collateral through its normal processes of checking available market data, third party sources. You heard Mr. Schneider testify about this in -- one of our experts who explained that between them, JPM and Bank of New York valued one and a half trillion dollars a day of repo collateral and they do it overnight. Now, Mr. Pfleiderer's report -- Professor Pfleiderer's report allows us how that couldn't possibly be right because they only had a day or two to do it. But that's what they do every day. And the only expert on that matter who came to the stand was Mr. Schneider and I suggest his unrefuted analysis suggests he's just right as a matter of common sense. That's why you use collateral agents.

Now Seery told us that Lehman carried the 50.6 -- carried the Fed repo on its books at 50.6. That's the 50.6 that JPM had put on the Fed repo. And Seery testified that Lehman took the position when it dealt with Barclays, that these marks were accurate. This also, by the way, shows that Lehman is marking the books by the end of the week. So, so much for it's all about whether there was GFS data on the 12th or the 11th or the 13th. They're marking the books by the end

of the week and they're carrying the Fed repo collateral at 50.6 billion.

When Barclays gets the repo collateral, it decides it wants to be unhappy with the values. It decides it wants to not accept the amount of Lehman's book value, that is, the amount that the Fed put on it. And it announced that the value is much lower. And we know that because we have Exhibit M-45 -- which that is not. There we go.

Now, Exhibit M-45 is a haircut summary prepared by Jasen Yang and delivered ultimately to Clackson and Ricci. And what it does is it takes the Lehman market value of 50.6 billion and applies a haircut of six billion dollars more. And that summary shows -- that summary was put together on September 18th when Barclays decided it wanted to demand more from Lehman. Now Barclays has contended in this case that when the repo collateral went from the Fed repo to the Lehman/Barclays repo, a lot of the collateral was different. It was much worse collateral. It was terrible collateral on Thursday when it was just dandy collateral on Wednesday. The fact of the matter is, our experts have showed without reputation that the five billion dollar write-down we're complaining about is in primarily the overlapping collateral, the collateral that makes it over. Four billion of the five billion dollar write-down is in there. It's not nearly the disconnect that Barclays would have the Court believe.

So enter Mr. Seery. Why is this relevant to Mr. Seery? This is relevant to Mr. Seery, who testified that he knew by Friday morning that the deal had completely changed, that the deal under consideration was to turn the repo into an asset sale. And Seery admitted that the 50.6 was Lehman's loss. And Seery said that in his dealings with Barclays over the shortfall of the repo, Lehman said the marks on the Fed collateral were accurate. Mr. Seery also testified he had confidence in that process.

Nonetheless, on Friday morning, Seery says he called together a group of traders and he told them to determine liquidation values for the classes of assets in the repo. Now initially, he told us that the primary purpose here was to prep Barry Ridings to testify gathering information from Mr. Ridings' testimony. Mr. Shapiro also gave us testimony to the effect that Ridings was going to be prepared to testify that liquidation was the worst alternative. That's Mr. Shapiro's testimony on August 23rd at page 115 in the transcript.

Now, prepping Ridings with liquidation values would have made sense if Ridings, in fact, was going to take the stand and say the deal on the table is better than liquidation value which is what he told the board because then he would have been able to say these are the liquidation values. So that's where Seery starts out when he takes the stand. We were prepping Barry Ridings to testify about liquidation values.

In fact, the liquidation value that Seery oversaw was used to set a lower negotiated price -- a familiar phrase now -- a lower negotiated price between Lehman and Barclays for the assets. Seery told the traders take a look at categories of assets. That's not line by line -- and find out whether they, if the market was very liquid, they could sell it this afternoon. If it wasn't so liquid, it would take a couple of days. Now Seery was well aware that Barclays had no intention of doing a fast liquidation. Barclays had no intention of turning around. He said that to us. They didn't tell him that and in his deposition he had said -- not in the highlighted portion. Down on line 12 -- they wouldn't do that. But still he asked the traders to form an opinion what kind of discount would you be forced to take if you were to liquidate these assets in a relatively short period of time. And he also told them to make that consideration at full size. Seery tells the traders come up with a value that reflects liquidation of the entire portfolio. That's a liquidation value. That is not a market value. And that number came to 45.5. And the reason we know that number came to 45.5 is Exhibit 147.

Now, Exhibit 147 is Yang's haircut summary nabbed up by Seery after the liquidation exercise that he instructed the traders to do. He told us the 45.5 billion was the total of liquidation for the repo collateral that that traders exercise had come up with. So the question, obviously, is what's the

1.9. The 1.9 is the contents of the unencumbered box that are added as part of the Friday asset grab. And in total, what those numbers give you is 47.4. That's the basis of Ms. Fife's number. 47.4. That's the basis.

So Ms. Fife is sent into court to tell the judge the markets have dropped and the values are only 47.4. And in fact, 45.5 billion of those value are not market values. They are lower liquidation values which Mr. Seery conceded was the basis of a lower negotiated price. He said these are the numbers they're reporting back if we had to do a fast liquidation -- that's how he described it. If we had to do a fast liquidation. But he also admitted that these numbers were used. They were a negotiated amount, a negotiated settlement number. That's what he agreed they were. And that negotiated lower settlement number became the basis for 47.4 back in front of the bar at the sale hearing. He sat right behind Mr. Miller and Ms. Fife. He could have poked them in the back that's not a market value; that's a liquidation value. But he chose to say nothing. No one corrected the lawyers at the hearing. Mr. Seery told us it never even occurred to him. He was asked, did it occur to you perhaps the Court ought to be advised that that was a negotiated settlement value rather than a number arrived at pursuant to Lehman's normal mark-to-market practices. "No, it did not." He allowed this, however, if it had occurred to him, he would have said something. "If it occurred to me, I

would have advised the Court." But we all know he didn't. We all know no one ever told the Court these were liquidation based values and they were the basis of a lower negotiated amount, lower than the Court was told was market value.

Mr. Seery also went on to say having heard Mr. McDade's testimony because he said when he was sitting here he was next to Mr. McDade and certainly sitting here would have heard Mr. McDade testify. But Mr. McDade's line by line valuation must have been wrong because it wouldn't achieve 7 -- it would get us to forty-nine and change if there had been a line by line valuation.

So Mr. McDade gives wrong testimony. Ms. Fife gives the wrong number. The man who put the liquidation number is sitting in the court. Barclays knows it's a negotiated settlement amount because they're the other half of the negotiations. Barclays doesn't tell its lawyers and the Court is not told.

Let's go back to 60(b). Whether that is a mistake, and it -- that's one explanation and it certainly is a mistake. Whether it's intentional, whether it's facilitating the innocent misrepresentation or whether it's some other basis for relief, that warrants 60(b) relief. The Court is given the wrong number for the deal at the sale hearing where it's asked to approve it. Now, Barclays, looking at that 45.5 billion number knows it has a problem and here's their explanation for

why that 45.5 just happens to be the same as the 45.5 its own internal valuators, it's PCG group came up months and months later. Bear in mind we can't test this because we haven't seen a single person from PCG take that stand. Barclays has not put one person involved in its internal valuations on the stand to be crossed examined to tell the Court about it. Instead, they bring an expert who says their methods look okay to me. So they get my Good Housekeeping seal of approval and PwC looked at, too, so that's two seals of approval. But no valuators. No Langerman (ph.), no Wachtell, no Teade (ph.), nobody. Here's Barclays' explanation. It's a coincidence, they say. It is a coincidence.

This is a footnote on the last page of Barclays' papers in the in limine motions, Your Honor. There is a numerical coincidence between the 45.5 billion estimated by some witnesses as the value of the repo and the 45.5 billion ultimate calculated by Barclays. I'm going to leave it to the Court to determine how likely that coincidence is to be true. Seery sat down and calculated that number. He wrote it on M-147. Someone fed it to Lori Fife. She mis-described it to the Court as a market value and it wasn't. That's a fundamental failure of disclosure and Barclays knew it. Barclays knew it because when they valued at the time what they took in, they were putting in in the range of fifty-two billion dollars. Not 47.4. Fifty-two billion dollars. I had Mr.

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Ricci agreed with me that Bank of New York was Barclays' agent. And Barclays' agent put the amount of collateral that made it over -- remember all the collateral doesn't make it over -- at forty-five. And we add the seven billion in cash that was added to make up the difference. Barclays is calculating its take at fifty-two billion dollars.

It's not just Mr. Ricci's testimony. Your Honor will recall this document, Exhibit M-147. This is Marty Malloy writing to LaRocca and Stephen King where he puts it at 52.19 on the 19th, the day of the sale hearing. That's the forty-five billion in cash that makes -- let me explain what I mean by makes it over, Your Honor. Your Honor, so this is only one place in the transcript, you'll recall that there were operational difficulties. All the collateral doesn't make it over. That adds to forty-five. And then the difference is made up in cash. Later, there's a dispute with JPM over who gets to keep the cash. But at the time, on the day of the sale hearing, Barclays is putting its take at fifty-two billion. Another person who put it there was our friend, Martin Kelly. While he's preparing the opening balance sheet, he's got 44.8 as inventory value, seven billion cash, so he's in the 52.9 range. And when he completes that opening balance sheet, he's got 52.880 as the value of the inventory received. Barclays knew 47.4 billion dollars was too low. They're calculating the number of billions and billions higher at the time.

Romain and others put the number at fifty-two. Mr. Romain testified -- I have the wrong slide. Excuse me, Your Honor. There we go. 9/20, that's the Saturday. There's Barclays analysis that puts the financial assets at 52.19. Mr. Yang who did the haircut summary puts the collateral that made it over at forty-five. Add seven billion. You're at fifty-two. So Barclays knew the number was too low. Actually, as late as October 3rd, Barclays is still at fifty-two.

There's a memo that includes Mr. Romain that puts the current acquisition balance sheet at fifty-two billion dollars. Now, this raises the obvious disclosure issue. Why isn't anybody telling the Court you're being told 47.4, Your Honor. But, you know, internally, at Barclays, we've got this roughly in the range of fifty-two. The reason is, as I averred to in the morning -- before, nobody ever told the Court there might be a range. Even if you accept the Barclays view that because a lot of this was Level 3 securities and Level 2 securities and this stuff was really complicated to value, nobody ever told that to the Court. They just said it's due to a drop in the markets.

I would point out, Your Honor, and I said I wouldn't deal with the valuation case, and I'm not, but it took Professor Pfleiderer two days on the stand to describe to this Court in excruciating detail just how complicated it is to come to any kind of value with Level 2 and Level 3 securities. It

took Ms. Fife about five seconds to pick 47.44 and nobody put a disclaimer on that number. Nobody said it could be fifty-two. It might not be 47.4. Nobody said anything like that.

I asked Mr. Ricci who was in the charge of the deal for Barclays, what did you do about disclosure. Your Honor will recall each time I asked him that, I got a ritual incantation. I assume my lawyers would make the disclosures that they were supposed to make. I just -- well he must have said that six times. He told us he took no special steps. The problem again is if you don't tell your lawyers, you can depend them all you want. But if they don't know the numbers, they can't make disclosure to the Court.

Now very briefly, Your Honor -- and very briefly, I'm going to address the Friday asset scramble. I think the testimony about that has been deep and extensive but only to point out that the end result is this. Barclays, on -- based on Exhibit M-45, based on Yang's haircut summary, which is sent to Keegan, Barclays demands more. Using -- Ricci told us this. I asked him about M-45. I asked him about the Yang haircut summary. And he said he would have given it to Keegan. And Keegan was in New York dealing with Barclays -- dealing with Lehman on Friday morning. And we know that Ricci, Michael Klein and Keegan met with McDade Lowitt and Kirk on Friday morning to come in and say we need more value. If we don't get more value, this deal is not going to close. Barclays said, in

its own words, it was uncomfortable with the repo collateral.

Now, according to Mr. McDade, Barclays never said this is how much we need. According to Mr. Ricci, there was a target of about three to four billion dollars. He told us that. But even Mr. Ricci believed that that target wasn't given to Lehman. Barclays never shared its calculation of how it got to that number with Lehman. And Barclays was clear about one thing. If it didn't get additional assets, it wasn't going to close. That's what they told Mr. McDade. I asked him how explicit was Barclays about saying it would not close if this gap could not be filled. His answer: they used those words. Mr. Klein, Barclays' senior advisor and a member of its negotiating team also had said that in his deposition which we talked about at the trial. This is the trial transcript where we're reading his testimony: "I made it known to the parties that were involved that there needed to be more assets because if there weren't more assets, the transaction couldn't take place. But no target, no measure, no analysis. Nobody says, well, you know, our repo haircut brings us 6.04. This is a holdup. This is the morning of the sale hearing. Lehman's got no negotiating leverage at this point. Barclays knows it's the only buyer in town as it's fond of reminding us. And it comes in and says based on our valuation which we're not going to share with you, you need more assets. And what happens then? McDade puts Lowitt in charge along with some others to go find

more assets to give to Barclays so that they can close the deal. And what follows is the Friday asset scramble. One of the people involved in that was also Alex Kirk. And Mr. Kirk wrote an e-mail, which Your Honor may remember from the opening, in which he identifies what appears to be Barclays' standard. "Rich Ricci just told me he won't blow off this trade by being a pig." This is simply Barclays saying we want more. We want more. You need to add more to the pile or we're not going to close. Now what makes that worse is putting Lowitt in charge of the Friday asset search. That basically sends -- that puts the fox right in the middle of the henhouse. Let's review Ian Lowitt a little bit.

Ian Lowitt is the chief financial officer of Lehman. By the 18th of September, before the Friday asset scramble even begins, he's under contract to Barclays. He has signed his employment agreement with Barclays. That employment agreement provides that Ian Lowitt will get a bonus of six million dollars. I asked Mr. Lowitt on the stand if that bonus was in respect of services to Lehman and he said no. It was for services to Barclays. He knows he's not going to get that contract, he's not going to have that job unless the deal closes. We talked about that when he was on the stand. "If the transaction doesn't close, you don't have a job at Barclays that following morning, correct?" "Correct." Now we can talk all we want about how Ian Lowitt may have wound up somewhere

else or Barclays may argue that the amount that they paid him was similar to the amount that he was paid at Lehman. I think everybody in this room can agree a job is better than no job. Six million guaranteed on Monday is better than I'm going to try and get six million somewhere else. Lowitt's got every financial incentive to satisfy Barclays when it demands more assets on the strength of a threat to refuse to close. And here we are again, back to disclosure. Only a few hours after the asset scramble is completed, the parties are in court. Barclays apparently has enough. It's decided not to blow off the deal by being a pig. And nobody tells the Court anything about this exercise. Nobody says we added 1.9 billion dollars in clearance box assets. Nobody says we added what turned out to be 769 million in 15c3-3 assets. Nobody says we added cash, we added margin derivatives. In fact, the Court is told there is no cash in the deal. Nobody talks about the Friday asset scramble.

Now, Barclays has responded to the proof about this exercise by suggesting -- and it was interesting to me that every single one of their witnesses -- perhaps this is another circumstances -- chose the word "identified" when they talked about the assets that were added by the Friday asset scramble. Every single one of them decided "identified" was the right verb. Well, they weren't just identified, they were added. They were added. If, as Barclays suggests, all that really

happened here is Barclays got some comfort that the overall value it was getting since it was getting everything included 1.9 billion and 769 million, those negotiations wouldn't have been necessary and, most certainly, the clarification letter wouldn't have been necessary. What would there have been to clarify.

The clarification letter adds these assets to the deal. They're not just identified, they're added. And again, let's look at the contemporaneous documents. First, I want to put a document that indicates Mr. Lowitt's mindset about getting it. This is Lowitt's e-mail to Tonucci. After they gathered up these assets, he urges Tonucci, "You need to be close to it. If we don't succeed, you and I are toast despite all heroics." He writes this on Saturday the 20th, two days before the closing.

Now, I asked Mr. Lowitt about that and he gave an answer along the lines about how he was concerned about the well being of all folks who had worked at Lehman. I would respectfully suggest that the phrase, "you and I are toast", means nothing of the kind. This is Ian Lowitt expressing to Paolo Tonucci who's working with him on the Friday asset scramble, you got to get this done. Add those assets or you and I are not going to have jobs. And maybe that explains why nobody took a lawyer aside and told them look, you should know about the addition of all these assets. Maybe that explains

it. But it's right there for everybody to see. Self interested future Barclays employees added billions to the pile that Barclays took away. And what Barclays was writing at the time didn't suggest, as Barclays would have it now, that all that really happened here were additional assets were identified. This is what Michael Klein, who had gone and delivered the threat not to close in return for the demand for more assets, wrote to Bob Diamond. On the 20th on Saturday after the asset grab was held and Mr. Diamond -- Mr. Klein wrote, "We clawed back three billion more of value in the transaction." We clawed back. That's not a man who's writing to his client saying don't worry. The deal is worth what we thought it was worth. We've identified existing assets that were already on their way over. That's a man who says, I've gotten them three billion dollars more. That's the man who's paid ten million dollars by Barclays for a week's worth. That's a man who's reporting he's worth the money. That's a man who says I got you three billion more to add to this deal. Not one word to the Court about any of this. No one tells any of the lawyers and therefore no one tells the Court.

Now again, that could be a mistake. It was a deal fraught with tension. It was a deal with communications problems. Mr. Miller used an invocative phrase about the week. He called it organized chaos. And in the organized chaos, this might be attributable to mistake. I would suggest it goes

further but I would also say the Court doesn't need to reach that issue if it's not inclined to make that finding. Mistake is enough under 60(b). Innocent misrepresentations is enough. But the failure to tell the Court about this is a misrepresentation indeed.

And that, Judge, brings us to the clarification letter, the next piece in the sequence. Now, Ms. Fife describes the clarification letter to the Court. And she did that not in the part of the sale hearing where she was describing the changes in the economic terms that I put up on the screen. In a different segment when she's describing what in a normal deal might be considered big issues but in this deal they're relatively insignificant. That is, whether a certain or sub or two are included. She says there was some conclusion as to which subsidiaries, if any, are being sold. And she says "And we clarified in a clarification letter which we're hoping to finalize and actually present to Your Honor whenever it comes down to it." But in that letter, we're going to clarify -- and she goes on to describe what's going to be clarified about these subsidiaries. That's everything the Court is told about the clarification letter before the sale order is submitted and signed. That's everything.

So what the Court is told is that there's a relatively minor issue regarding risking some subsidiaries that's going to be dealt with in something with a benign name "clarification

letter" and we're hoping to finalize and get it down. It's undisputed that the clarification letter did not make it down. It's undisputed the clarification letter was never ever given to the Court under a request that it be approved. It was merely filed on the 22nd after the closing as an exhibit to other closing papers. The letter never made it down here. And the letter did much, much, much more than deal with this subsidiary issue about subsidiaries. What the letter did is incorporated the billions that had been made on Friday to add billions more in assets to the deal and make other substantial changes.

Now I want to go through for a few minutes the sequence that led to that because the timing, I think, is instructive. At about 12:34 p.m. -- let me put this up on the screen -- at about 12:34 p.m., a draft of the clarification letter is circulated on the day of the sale hearing. And it's this draft -- and this is before the sale hearing even begins. It's this draft that adds the phrase "amended" to the clarification. There have been and they are in evidence as a variety of movants' exhibits and Barclays' exhibits other earlier drafts of the clarification letter. They started working on this as early as the 17th. No surprise there's going to be some kind of clarification document given the organized chaos in which they're dealing but it's just a clarification letter until here. Now, the phrase "shall amend"

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is added. And Mr. Lewkow testified about that. And what Mr. Lewkow is justifiably -- he's a good lawyer. He's a good firm. All the lawyers involved in this were at good firms. Nobody chooses the word "amend" accidentally. This was a deliberate choice to bump this clarification letter up from a supplement, from a clarification which is how it's described in the sale order to an amendment of the asset purchase agreement. Nobody tells the Court that's what it's going to be. Nobody shows the Court that draft. Now later in the day, at about 5:15 p.m., another draft is surfaced. And I'm going to put that up on the screen. And that's Exhibit M-137.

Now this is circulated about 5:15 on the 19th, the day of the sale hearing. And the reason I chose this one to put up, and there are multiple drafts of the clarification letter, is because this is -- if you look at the transcript and judging from the start time at -- there's an adjournment in the beginning and folks started actually addressing the Court in the late afternoon. I think this draft is just about the time that Ms. Fife is describing the economic changes in the deal. Someone in the drafting process is attempting to get that into the clarification letter where it says the purchased assets do not have a book value of approximately seventy million (sic). But they obviously do. So what this indicates s that as the sale hearing is continuing, someone in the drafting process is recognizing -- they're changing the seventy billion dollar book

value clause -- and you have to recognize it's no longer worth seventy million (sic) dollars. Now Ms. Fife said when she talked to the Court we're hoping to get it down here. Mr. Miller, when we asked him about that -- about the clarification letter on the stand described to us that there was a draft. It may have made its way into the court by e-mail. Lawyers may have had access to it but that's no way to review the document like this. And he was told that the letter was wrong so it needed to be redone. Those were all various explanations perhaps for why it was not shown. But this draft was never brought to the Court's attention, the clarification letter which recognizes the dropping book value. It also indicates that the lawyers, and that would, of course, include Ms. Fife, who's talking about 47.4, are still talking in terms of book value. As late as 5:15 on the 19th, nobody's got a clue that the Lehman's book value. Lehman's book value, according to Mr. Seery, is about 50.6 if you use the Fed repo as the measure. So the lawyers are still talking in terms of book value. This is not shown.

Now the next draft is Exhibit BCI-466 -- and when I say the next draft, Your Honor, again, there may interim drafts. This went through a lot. But this one is one I think is instructive. Now it's -- the draft slide at the top of this puts the document itself at 12 a.m. on the 20th. So we've annotated it as midnight the 19th or the 20th. Your Honor will

recall better than anybody in this room that at that point, you're twenty minutes away from the end of the sale hearing. And here, this draft, even twenty minutes before the sale hearing is over, now has changed that clause a little bit, do not have a book value of approximately seventy billion but rather have a book value of approximately 45.5 billion. So the lawyers who are involved in the clarification letter, even at this point, as the sale hearing draws to a close, apparently still had not been including that that 45.5 which is a component of the 47.4 that Ms. Fife gave, is not book value. It's a deliberately chosen negotiated settlement value based on a liquidation analysis that Jim Seery headed up. Nobody has even told the lawyers that. So how could anyone have told the Court?

Now that's the last draft at least that I've been able to find. There may be one or two. I may -- I don't want to misspeak. But that puts us near the end of sale hearing in my view. So what happens next? The sale hearing ends at twenty minutes after midnight. The Court says it will approve the sale order and the parties say -- the sale and the parties say they will submit a form of sale order to reflect the changes. But the Court is never given a clarification letter. The clarification letter, though, continues to be the source of a lot of activity in the ensuing weekend. And the next draft I want to put up here is Exhibit M-53. Now this is a draft -- M-

53 is a draft of the clarification letter circulated by a lawyer at Weil Gotshal whose name is escaping me at the moment. I think it may be Mr. Murgio -- at 2:39 p.m. And the cover e-mail reflects that it's -- it discusses the changes we talked about last night. This is the first draft that we see generated after everybody's gotten a little sleep on Saturday. And they're reconvening to look at the clarification letter.

And what do they do here? Here, they change the definition of "purchased assets" in an asset purchase agreement. They change the definition of "purchased assets" in an asset purchase agreement and Barclays would have the Court find that that's an immaterial change. It changes the whole deal. It changes the deal from the seventy billion dollar long value -- the long position of seventy billion dollar book value as of the date hereof. It changes the deal from Ms. Fife's modification of that at the Friday sale hearing when she says it's dropped. It was seventy and it's dropped to 47.4. And what it adds are the assets transferred in the repurchase agreement, something the Court has never had described to it, something nobody ever substantially mentioned to the Court. The contents of the clearance box, something that's never been enumerated to or disclosed to the Court -- and what it does is it strikes out the agreement that's been there all week. It strikes out in the strikeout in the middle of the page the reference to the long position.

So the clarification letter at least is accurate to the extent that even before the sale hearing began amends the asset purchase agreement and no one brings it to the Court. No one asked the Court to approve this. No one explains the impact of these changes.

Now the last change I want to focus on in the clarification letter emanates from an e-mail that was sent over the weekend on the 21st. Now we're on the Sunday. And this e-mail comes from Sullivan -- comes from Cleary Gottlieb. And circulates language generated by Sullivan & Cromwell who also represented Barclays. And what this does is proposed language for unwinding the repurchase agreement. Let me stop at that point for a minute and remind Your Honor what the movants' position is with regard to the unwinding of the repo.

The repo is terminated by Barclays through a notice of termination -- and that's in evidence -- on Friday afternoon after LBI files. Under Section 559 of the Bankruptcy Code, that would allow the party that advanced funds in the repo to be paid the amount in advance. But the excess, the haircut, in that repo needs to be paid back into the estate. The safe harbor only extends to the amount advanced by the lender in the repo transaction. What this language purports to do is to retroactively rescind the notice of termination. And the only purpose it can really have is to avoid Section 559. Make it not be a terminated repo anymore. And what does that achieve

over this weekend? It means we won't have to go back to court. That's why that paragraph was put in the agreement. Now here's the proof about that paragraph. That paragraph emanates from the Barclays side of the negotiating table. And both Mr. Lewkow and Mr. Miller and all the deponents whose testimony is in the record about this have testified there were no discussions between the Lehman side of the table and the Barclays side of the table -- the lawyers -- about the Bankruptcy Code implication of that paragraph, about the 559 implication.

Now that is relevant to the disclosure point. If the lawyers didn't even talk about the 559 implication, then how could they have made a knowledgeable decision about whether that, even if it's just that, should be brought back to the Court for approval or for a review. That's a five billion dollar item right there.

Now I'll leave the Court to draw its conclusions -- I have my own -- about the fact that this comes only from the Barclays side of the table. There's other evidence in the record that Barclays is at least, through Cleary Gottlieb, is at least talking to others about 559. There's some correspondence between Mr. Rosen and the SEC given the safe harbors. That's not about this paragraph. I'm going to overstate that point. But I do want to suggest that the only people who seem to focus the Section 559 implications were the

Barclays side of the table.

Now lawyers who are unaware of the economics -- and all the lawyers told us they didn't know about the repo on Friday. They didn't know about the termination of the repo on Friday. It wasn't until Saturday they found out it had been terminated -- that it existed as a part of a transaction as opposed to merely interim financing, that it was terminated and that they had to deal with this issue. So they're long gone from court. In any event, they don't talk about it.

Let's go back to 60(b). At the very least, the failure to bring to the Court's attention a clarification letter that amends the asset purchase agreement, that changes the definition of "purchased asset" in an asset purchase agreement, and that it makes a five billion dollar maneuver with regard to a repurchased agreement which was at the center of the deal but about which the Court had never been told -- the failure to bring that back to the Court is at the very least a serious mistake. It's a serious mistake made by lawyers who had not been informed by their clients of the information they need to have to make a considered decision. They don't know the numbers. They don't know the role that the repo plays. They don't know about the termination until the weekend. They don't know any of those things. And in an organized chaos, they put together what has continued to have the misnomer clarification letter but more accurately would be

called amendment to the asset purchase agreement. That's what this did. How could anyone contend that reasonable disclosure was made, that necessary disclosure was made in a 363 sale when an amendment to the agreement the Court was asked to approve was never brought to the Court's attention? It never was. And it was never brought to the Court's attention because the lawyers involved were disabled from making the necessary disclosures.

Now, in connection with this, I want to draw the Court's attention to some testimony -- I believe it was from Mr. Lewkow -- about the hallway dispute, the hallway conversation, at the offices of Weil Gotshal over the weekend concerning 15c3. Mr. Lewkow described it and I think Mr. Klein may have also but I'm not entirely certain of that. And he described how there was a billion dollar issue. Was it 769 or was it 1.8 billion and nobody was able to get a transcript over the weekend to see what the Court had actually been told about the cash fees. And the resolution, according to Mr. Lewkow, was that Barclays left a billion dollars on the table. He said he would take the 769. He left a billion dollars on the table. That tells us two things. That tells us that Barclays was so comfortable with the buffer it had built into this deal it was happy to leave a billion dollars on the table to get it closed and not have to go back to the court. It also tells us that Barclays was so anxious not to come back to the court it was

willing to leave a billion dollars on the table.

How could a decision be made to do that when the choice was simply on Monday, over the weekend, be in touch with the Court to say there's been a big development. That clarification letter that we mentioned, it actually amends the deal. We made a five billion dollar adjustment. We need to know a bit about this repo. We need to talk about what we're doing under 559. What bankruptcy lawyer wouldn't conclude, as a matter of basic instinct or intuition, that needs to be disclosed to the judge? Now I'm a little presumptuous speaking as a bankruptcy lawyer, Your Honor. I'm just a litigator. I'm becoming one, though, as we speak. And I know I have a sense of what a bankruptcy lawyer would say. Bring it to the Court. The Court on Friday at the hearing expressly made the parties aware it will be available on Saturday. Now I don't know the Court's availability on Sunday. We don't have proof of that. What we do know, this was a huge deal. This was a big transaction. It was an extraordinary transaction. Can anyone have thought there was no way to reach the Court to disclose this?

What drove that decision? What drove that decision, Barclays' insistence that the deal had to close on Monday before the markets opened. Remember, Barclays' e-mail on Friday saying you don't add more to this deal, we're not going to close. Now the asset purchase agreement provided that the

closing would take place, I think, on the Tuesday, but in any event, allowing the parties to adjourn it. There has been no proof in the record at all that that closing absolutely had to happen before the open. There is deposition to opening of the market. Good idea but not critical. And what's the balance here? Is this one other episode when Barclays will argue, well, it was important. It was -- the numbers were big. It was complicated. This is when we relax the requirements of 363? This is where we relax the disclosure requirements? Again, I'd argue the answer to that has got to be a resounding rejection. This is the point where the rubber hits the road. This is the point where disclosure is critical. This is the point where steps need to be taken to tell the Court what's happening. And no one did. This is mistake. This warrants 60(b) relief.

Now the parties have one other opportunity in December to come in and talk about the numbers. I'm just going to spend thirty seconds or so on that just to point out that in all of the proceedings in December, Barclays will say, well, you know that affidavit did go in and it said 50.6 billion dollars. No one stood up and said, Judge, you need to know what happened. We had three months, four months to figure this out. And before you approve the settlement, we want to explain those numbers again.

And what surrounds the December 22nd settlement is my

next point which is timeliness. Every single party in that room at the time -- at the December 22nd hearing made clear to the Court there were still questions surrounding this transaction that needed to be addressed. The Court itself knew that it won cooperation between the creditors' committee and Barclays to turn over necessary information to make sure questions about the deal were answered. Mr. Miller said there were questions. Mr. Schiller himself agreed that the settlement didn't bind anybody and recognized there were things to be had on a go forward basis.

Then seven months later, Barclays announced a 4.2 billion dollar gain in its February results. And that gets the world a little agitated, at least the lawyers on my side of the table. And people started asking Barclays even more fervently for information. That doesn't work. We had to come to court in May and get a compulsory order, a June 2004 order, making Barclays turn over information that nobody could get out of Barclays before. We take several dozen depositions. We review hundreds of thousands of pages of documents. We make a Rule 60 motion three days after the last deposition is taken. And Barclays says it wasn't timely. Well, the argument is, quite frankly, ridiculous.

Your Honor heard the testimony of Mr. Marsal. Your Honor heard the testimony of Mr. Burian. Barclays itself played the video of Mssrs. Fogarty and Coles. And all of them

were consistent in their testimony. Barclays just didn't respond when information was requested. Mr. Marsal told us the estate had to threaten to sue Barclays under the transition services agreement as late as December of 2008 to get reasonable information to figure out a lot of things about the estate which would have included what happened here. There was no sitting on any hands. When the information became available, the movants moved with alacrity. I think timeliness is a red herring. I think it should be treated as a red herring.

Now I just want to return to where I started, Your Honor, and that is with regard to what these proceedings were about and what Rule 60(b) is about. A 363 sale is about disclosure. This is a court of disclosure. The standards don't relax because it's hard. Those standards are more important than ever when the deal is hard. Barclays would take the position that it should be forgiven all sorts of lapses in disclosure to the Court. It's okay that the Court wasn't told the range could 45.5 to fifty-two as we were saying inside of Barclays. It's okay that the Court was told 1.5 billion when we, Barclays, were calculating only 200 million dollars. It's okay that the Court's told two billion dollars when we're planning to pay only 1.4. Even on that, even on a 500 million dollar difference, the Court expressly allowed, expressly said at the September 17th hearing, I still consider 500 million

dollars to be material. I think we all do. Barclays would contend it's okay to bring an expert on the stand to say it's just so complicated. Level 2 and Level 3 are just so difficult to value with precision that I'm going to tell you reasonable people could come to a very wide range. Why didn't anyone tell that to the Court, to the creditors, to the interested parties, to the public at the September 19th hearing? The answer is nobody told the lawyers. If you don't tell the lawyers, the lawyers can't tell the Court.

I said in the opening that one essential problem with this transaction is the people who knew didn't speak and the people who spoke to the Court didn't know. And I think the proof in the trial bore that out in spades. I think the testimony in this case demonstrates Barclays' idea of disclosure is best personified in Mr. Hughes' mystery novel, pieces of information from which the truth could have been deduced. It's seen in Jim Seery, on his way to Barclays, not even correcting the lawyer who's three feet away from him when fundamentally wrong numbers are given to the Court. It's seen in Barclays' decision that it wasn't necessary to disclose to the Court a precondition of the deal that it make a windfall gain.

We know the numbers are large. That makes disclosure important not less important. We know the deal is important. That makes disclosure critical not less critical. Those

disclosure obligations were not met here. Because they were not met here, the Court issued a sale order on a skewed record. We ask that the Court enforce the sale order on the record that was actually before it. The public, the parties are entitled to have a sale order that reflects the record upon which it is based. That sale order was based on a record that showed a 1.85 billion net benefit to Lehman. The proof in this case shows that not only did Lehman not get that net benefit, Barclays walked away with eleven billion dollars more that this Court was never told about. That's inequitable. It violates the principles and underpinnings of 362. It's offensive to the disclosure qualities that are critical in this court. And it cries out for relief under 60(b).

So respectfully, Your Honor, I'll conclude at this point unless in the unlikely event you have questions. And other than that, I'll defer to Mr. Tecce.

THE COURT: Thank you very much, Mr. Gaffey. I just want to explore the need for a break. I don't have a need for a break. But we have a very full courtroom. And my inclination is to simply proceed. I don't want this to be a forum for cruel and unusual punishment either.

MR. TECCE: Your Honor, I'm happy to proceed.

THE COURT: Let's go.

MR. TECCE: I may just need a minute to get set up. But --

THE COURT: And for those people who are standing, I'm just wondering if it's possible for people to push over a little bit and give them a place to sit down if they want to sit.

(Pause)

MR. TECCE: Your Honor, we have some slides. If I may approach?

THE COURT: Sure.

MR. TECCE: Thank you.

(Pause)

MR. TECCE: Good morning, Your Honor. For the record, James Tecce of Quinn Emanuel Urquhart & Sullivan on behalf of the official committee. Your Honor, committee's Rule 60 motion starts by reciting a simple phrase coined by Supreme Court Justice Louis Brandeis. "Sunshine is the most powerful of all disinfectants." Transparency is a concept that lies at the core of bankruptcy practice and procedure in this country. Full and fair disclosure is not just relevant in the context of 363 sales where it is a precondition to 363(m) protections but it dictates the method and manner of administering any bankruptcy case. And while a protracted proceeding that closes today has gone far to eliminate the facts and circumstances surrounding the sale transaction, absent relief from the sale order requested by the committee and the other Rule 60 movants, a sale process will remain forever infected because the balance

going concern transaction presented to and approved by the Court bears no resemblance to the consummated transaction where assets were liquidated to Barclays at breakneck speed.

In the committee's view, the speed of the transaction did not mandate reduced or relaxed disclosure requirements; rather, it heightened disclosure and the need for disclosure.

At all times, the transaction is advertised as a going concern sale. When the transaction was first introduced, the committee was advised that the transaction was emergent, that the committee would have little time to diligence the transaction but that the sacrifice attendant to expediency was necessary in furtherance of the greater good of selling the assets on a going concern basis. Unbeknownst to the Court and the committee, the consummated transaction was, in point of fact, a liquidation, the very consequence the transaction was advertised to avoid.

With respect to the committee, the centerpiece of Barclays' defense is that the committee was aware of all material aspects of the consummated transaction or that the committee should have been smart enough to figure it out. Barclays argues the committee filed to take timely action to bring any discrepancies to the Court's attention within the applicable limitations periods. It also argues the committee consented to all post-hearing modifications irrespective of their materiality.

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For that reason, Your Honor, this morning the committee will set the record straight by answering the simple question of what did the committee know and when did the committee know it with reference to testimonial documentary evidence at various points in time from its appointment to the commencement of these proceedings. And that examination will confirm that the committee was not aware of any negotiated block discount off of Lehman's book value or the attribution of liquidation valuations to the trading book assets. It also leads to the inescapable conclusion that the committee's conduct can only be described as a persistent pattern and practice of prodding for reconciling information from and after the moment the transaction closed through and including the filing of the instant motions.

Now answering the question of what did the committee know and when did it know it is best accomplished by reviewing a chronology of the transaction from the committee's perspective during three time periods in this proceeding. We define the first time period as drinking from a fire hose. And that's the period from September 17th, which is the committee's appointment, through September 22nd which is the closing date of the sale transaction.

The committee refers to the second phase as trust but verified. And this is the phase from the closing of the sale transaction through the December settlement in December of 2008

among Barclays, LBI and JPM. And that encompasses the committee's attempts to reconcile representations made concerning the transaction during the sale hearing and to the committee's representatives over the closing weekend.

The committee's styles the third period as attempts at cooperation devolved to litigation. This examines attempts by the committee to cooperatively attain information and ultimately the initiation of this proceeding.

Starting with the first phase, drinking from a fire hose, the committee is appointed on the 17th of September. It retains its professionals on the same day. Indeed, committee's counsel is retained forty minutes -- forty minutes before the bid procedures hearing commences on Wednesday, September 17th. On the 18th of September, Thursday, the estate's professionals introduce the committee's professionals formally to the sale transaction where representatives of Milbank, Houlihan Lokey arrive at Weil Gotshal for a meeting with Lehman principals and advisors. And during that meeting, Movants' Exhibit 2 is distributed. And consistent with Movants' Exhibit 2, the transaction is described to the committee as one in balance. So while a buffer exists between attorney assets of 72.65 billion and the liabilities of 68.4, that buffer is balanced out by curing compensation liabilities of 2.25 and two billion dollars.

As Mr. Burian testified in this trial, we were told

these numbers are right off the books and records of Lehman, but they were also taking roughly four and a quarter billion of liabilities for cure and comp and therefore, you know, based on the mark to value a book, based on the value of the assets, of the liabilities being picked up, it was, you know, a balanced exchange of exactly seventy-two spot sixty-five against seventy-two spot sixty-five.

Now, at that September 18th meeting, the transaction is described as emergent and the committee there is little that it can do to diligence the transaction given the time constraints that the estates are operating under. And importantly, the transaction is described as a going concern sale, not a liquidation. And that's squared with the plain text of the asset purchase agreement which stated the values attributable to a trading book assets and liabilities were valued based on Lehman's book. Again, as Mr. Burian testified, "[I]t was made very clear to us that we were benefitting, because we were selling assets and liabilities in a balanced transaction in respect of these assets. These were the more liquid broker-dealer assets, and that in lieu of a wholesale liquidation in which we'd have to take a liquidation value for these assets..."

And that's squared with the testimony in this trial of another Lehman representative, Mr. Shapiro, who is the self-styled architect of this transaction, that "the absence of the

sale would have led to, you know, a near term liquidation, whatever you want to call that."

Now, moving to Friday, September 19th. The committee's professionals continue in their best efforts to diligence the transaction. And that morning, Mr. Burian has a call with Mr. Seery and Mr. Shapiro. And Mr. Burian takes notes during that conference call and they appear and have been admitted as Exhibit M-380 in this case. And importantly, during the course of this conversation between Mr. Seery and/or Mr. Shapiro and Mr. Burian, Mr. Burian receives three separate descriptions of the sale transaction, each of which is reflected in his notes.

The first description appears on page 38189. And Mr. Burian is told that the deal is changing, that the deal now consists of 50.6 billion in assets. Mr. Burian is told about the Fed repo, that Barclays stepped into the shoes of the Federal Reserve. He is also told about the difference between the advanced amount under the Fed repo of 45.5 billion and the value of the asset securing that facility at 50.6 billion. And in point of fact, Mr. Burian's notes reflect the five billion dollar difference between the amount advanced under the repo and the repo collateral. But most importantly, Mr. Burian is told after receiving this description to "Scratch that. That's all wrong. Let me give it to you again." And consistent with Mr. Seery's instruction, Mr. Burian does, in point of fact,

scratch out his notes. And he then proceeds to receive the second description of the sale transaction which appears on page 38190 of his notes. And here, Mr. Burian is told that there are 45.5 billion of long positions left, that all the shorts are closed out and that the loan is 45.5 billion dollars.

But when giving the second description, Mr. Seery shifts gears again on Mr. Burian. As Mr. Burian testified, "He then said to me, hey, we're now 47.4 billion of assets against 45.5 billion of liabilities plus the cure and the employee is roughly four billion. So, you know, the estate is two billion dollars ahead." Mr. Burian says to him, "You know something? You're talking to me, you know, as if I know what's going on in your head and is what deal you thought was happening this morning and how it changed from last night. I know what you told us last night. I know what the deal was Wednesday and where we were Thursday. Can you just give it to me simple?" And Mr. Burian turned the page and proceeded to receive the third description of the sale transaction from Mr. Seery. And that description appears on page 38191 of Mr. Burian's notes. And there he's told that they had seventy-two billion dollars of assets and sixty-eight billion dollars of liabilities under the contract. And that's no longer true. The transaction now has 47.4 billion dollars of assets and 45.5 billion dollars of liabilities and the cure and the comp are 2.25 and two billion,

respectively."

The bottom line, Your Honor, from these three descriptions is that this is the last conversation that Mr. Burian has with an estate of Barclays representative before he goes to court for the sale hearing on the 19th of September. Now, Mr. Seery has his own version of the discussion. And importantly, Your Honor, when Mr. Burian was asked: "Did anyone tell you during that conversation that the methodology had changed since they had reported to the Court or filed the APA with the Court?

"A. No.

"Q. Did anyone tell you during that conversation that they were ascribing liquidation values to arrive at that either 45.5 or 47.4 number?

"A. At no time did anyone ever tell me that the deal had changed and that we weren't getting going-concern value, but there was a liquidation discount or liquidation methodology being realized."

Mr. Burian says: "[I]t was very clear to me they were being provided to me in a manner consistent with every conversation we'd had about the topic, which is, as a going concern, mark-to-market, in a manner in which any reasonable broker-dealer would do at the close of business of every single day."

Now, Mr. Seery has his own version of this discussion.

And according to Mr. Seery, he advised Mr. Burian that the 45.5 billion dollar figure ascribed to the trading assets reflected a negotiated discount. The forty-five billion dollar number was not a mark-to-market number. It was a negotiated number.

And the issue of how these assets are valued is very important because Barclays is relying on Mr. Seery's testimony to say that the committee was aware of all material aspects of this transaction. However, Mr. Seery's testimony lacks the clarity and consistency and corroboration of Mr. Burian's. I make three brief points here.

First, Mr. Seery's testimony has evolved throughout this case. Mr. Seery submitted a declaration in this case after he had been deposed in which he purports to speak to the conversation that he had with Mr. Burian and he purports to speak to Mr. Burian's notes of that conversation. And in that declaration, Mr. Seery states: "My recollection is that the part -- primary information that had changed was that Lehman's short positions had been closed out and that the estimated actual value of the Fed repo securities, as opposed to their marked value, had shrunk to approximately 45.5 billion. However, I consistently stressed to committee representatives that the five billion dollar difference between the advanced amount and the marked amount of the securities remained and that was the primary reason for my conversation with them at the time."

Now, notwithstanding this declaration, Mr. Seery admitted that he never enunciated those words, "estimated actual values", to Mr. Burian. When he was asked, "Well, sir, the words 'estimated actual value' appear in the declaration that you signed. Is it now your testimony that these were not the words that you spoke to Mr. Burian in describing the 45.5 billion?"

"A. I don't believe I used those words and I don't believe in this declaration that I said I actually used those words. So those are a rough approximation of the type of words that we talked about value. Estimated actual value is what the declaration says."

Mr. Seery also submits that he told Mr. Burian that the 45.5 billion dollar figure was "negotiated". Now, on the first day of his testimony at the trial when he was examined by the committee, Mr. Seery makes no mention of the phrase "negotiated amount" or the word "negotiated". On the second day of testifying, when examined by Barclays, for the very first time he refers to the 45.5 billion dollar figure as a negotiated value. And when cross-examined by the committee that day, he admitted, as he must, that he never referred to a negotiated figure in two depositions in this case before the trial. He never referred to it in his declaration. He never said it on direct examination. It appears for the first time when Mr. Seery is questioned by Barclays' attorneys. And Mr. Seery also

admits that he never used the term "negotiated settlement value" when talking to the committee's representative. When asked, "And there's nothing in your notes of that meeting on Sunday, is there, sir, that indicates that the assets were being valued based on a negotiated settlement between Barclays and Lehman, right?

"A. I don't believe I had ever used those words in my notes.

"Q. Okay. You never used those words in connection with the deal until your testimony here this morning, correct, sir?

"A. I think I told Saul that we cut a deal. So I probably never used negotiated settlement amount."

The second point I would make about Mr. Seery's testimony is that he concedes he never told Mr. Burian or the committee representatives that the assignment undertaken by the Lehman traders was to arrive at a liquidation value for the trading assets. What he told them is that it was to give their view as to market value. When asked, "[T]here isn't any reference here, and there wasn't any reference in the communication you made to Mr. Burian to an instruction to the traders to develop liquidation bids, correct, sir?

"A. I don't recollect specifically if I said what we did. I did tell him that we had our traders give us a view as to the market value at that time."

And when asked: "[W]hen you described the input that the traders had given, did you talk to Mr. Burian about the

fact that the traders had given that input that morning in response to your request that they give you liquidation bids for the collateral?" His answer: "I don't believe that I went into -- I would have -- I don't recollect the specific words but I don't believe I would have gone into that level of detail, no."

The third and last point I would make about Mr. Seery's testimony is that whatever Mr. Seery says was the sum and substance of his conversations with Mr. Burian, Mr. Seery is not the final word when it comes to the creditors' committee. The final conversation, which I'll get to in a minute, takes place between Mr. Klein and Mr. Burian. It's Mr. Klein who gives the final answer and it's in response to many of the conversations that were had between Mr. Seery and the information that had been provided to the committee over the closing repo.

Now after this call between Mr. Burian and Mr. Seery on Friday, September 19th, the sale hearing commences later that afternoon. And at that hearing, the valuation attributed to the assets is 47.4 billion dollars. And the marks, according to Mr. McDade, were updated through the date of the sale hearing. And notably, Mr. Burian testified that the remarks that were made in court on September 19th squared with Mr. Seery's conversation that he had had hours earlier. They also matched Mr. Burian's notes which appear at 38191 of 47.4

billion and 45.5. After the sale hearing, on September 20th, the Saturday, the parties assemble at Weil Gotshal to close the transaction. The committee advisors make their way to Weil on that Saturday to attend the closing. And Mr. Despins, before the day gets underway fully, sends Mr. Miller an e-mail insisting that he "be kind enough to make sure that your corporate team involves my corporate partners including Crayton Bell in all discussions and meetings with respect to the documentation and the closing of the Barclays transaction".

And Mr. Burian testified that when the committee advisors arrive on Saturday, they have the mantra of saying, "Tell us what's going on. We're asking for as much information and detail as possible about the assets that were transferred."

But unfortunately, Mr. Burian also testified that for the most part the committee representatives were ignored and excluded from substantive meetings and discussions. And at the time, no one could describe the transaction to him.

And the closing continues on the Sunday morning. And on Sunday morning, Houlihan representatives approach Mr. Seery demanding a list of assets that were being transferred. And on Sunday morning at 11:30, this document is distributed. And this is less than twenty-four hours before the transaction closes. The U.S. schedules were approximately 12,000 CUSIPs. And this is Exhibit M-381. And as soon as Houlihan gets the schedules and asks Mr. Seery to explain why these numbers are

inconsistent with what was said in court on Friday -- the schedule lists a market value of 49.9 billion. We were told that the assets during court were 47.4 billion. And Mr. Seery's response is that these schedules are out of date. He was not even sure if these were the assets that were being transferred. But he would refer back to us with updated information. And that's at 11:30 on Sunday morning.

And, Your Honor, notwithstanding the enormity of the task, Houlihan actually tried to diligence this schedule by undertaking a CUSIP by CUSIP analysis. Mr. Burian put out an all-points bulletin for every analyst he could get his hands on and it was at his disposal. But even Barclays' expert and Mr. Seery conclude that the committee professionals did not have the ability to diligence these schedules prior to the closing. As Professor Pfleiderer says:

"Q. And in the time that was available the week of September 15th through the closing on 22nd, your view is that no line by line CUSIP valuation could have been done with any great precision, is that right?

"A. I think that's definitely true."

Mr. Seery conceded: "And you would agree, would you not, sir, that the committee didn't have any ability to value this portfolio independently on Sunday, September 21, correct?

"A. I don't think they could have valued this portfolio, no."

Simply put, diligencing these schedules that weekend

was impossible.

Now, as of 11 p.m. on Sunday night, the 21st, the committee professionals had still not heard back from Mr. Seery or gotten any updates with respect to the schedules that they had received at 11:00 that morning. And a committee call is convened at 11 p.m. on Sunday. The concerns with respect to the schedules are discussed. Concerns about the differences between the value appearing on the schedules and the representations made in court are discussed. And the committee advisors indicate that they are awaiting an explanation. And during the course of this call, committee's instruction to its financial advisor is clear. In response to the question of whether Mr. Burian was "able to get any instruction or authority from the committee to consent to the transaction as he understood it at that point", he answered, "Very direct and significant conversations. We were informed directly and bluntly that we were to observe. We were to participate. We were not to consent."

And at this time, Your Honor, the uncertainty about the schedules, the uncertainty about the marks, the uncertainty about the assets being transferred, this creates a level of agitation in Mr. Burian that compels him to corner Mr. Miller and insist on a meeting to provide them with an explanation as to what is happening in the transaction. And Mr. Burian testified -- he said to Mr. Miller, "This is ridiculous.

You're telling me you're about to close the largest transaction ever and you don't even know what you're transferring and that you're too busy to tell the committee what you're doing? Don't you think at least you should get an explanation and I can listen and hear it?" And that was critical to Mr. Burian 'cause he was trying to reconcile information they received on the schedules with representations that were made to the Court thirty-six hours earlier. And in response to this request, a meeting ensues among Mr. Klein, Ms. Fife, Mr. Roberts, Mr. Miller, Mr. Burian and Mr. Michael Fazio of Houlihan. And that meeting is arranged by Mr. Miller. And during the course of that meeting, Mr. Klein engages in a conversation. He explains the transaction to the committee representatives that are present and writing its components on a manila folder.

And during this meeting, there is no discussion of a block discount. There is no discussion of liquidation values. What Mr. Klein says is that because of declines in the market, the marked value of the securities declined from 49.9 to somewhere between forty-four and forty-five billion and that Barclays was receiving the 1.9 billion dollar unencumbered box and this brought the number up to forty-seven billion. And Mr. Burian testified "Pre-mark, it was clear in the room, was old value. Post-mark, we're sitting here today. Post-mark, they are now worth forty-four to forty-five billion dollars...The meaning was obvious in the room. I mean, he said pre-mark.

We're talking about Lehman's books and records. The 49 point whatever billion was pre-mark, post-mark...You know, going concern, mark to market in a manner in which every other broker/dealer might mark a book."

And interestingly, Your Honor, the number that appears in the upper left-hand corner of the manila folder of 49.9 squares with the number that appeared on the schedule at 49.9 that we received twelve hours and that we were told to ignore as being out of date.

Now, Mr. Klein testified to say that he described the values as notational values. But that doesn't appear anywhere on that folder. What does appear on the folder is pre-mark and post-mark. And during the course of this conversation, Your Honor, Mr. Burian and Mr. Fazio did their homework. Mr. Burian testified in this court for two days. That examination should have revealed clearly that he is not a shrinking violet. The committee advisors asked during this conversation about the basis for concluding that the market value for these assets had declined by five billion dollars. And they simply did not get an answer. As Mr. Burian testified, "I mean, Mike" -- and that's Mike Fazio of Houlihan -- "jumped in and said, wait a minute. What's going on here? Some of these government security issues have gone up in value. Like, what do you mean pre-mark and post-mark, you know, the market has dropped?...Mr. Klein sort of made a face, you know, as if do we not understand

what's going on in the world, you know. But I don't know what he was really thinking...But we raised the issue and I'm positive that Mr. Klein several times during that meeting used the word 'market value'."

And also on this slide, Your Honor, when asked the question of whether there was any mention during the meeting of Lehman or Barclays using liquidation value or a hypothetical liquidation value to arrive at the post-mark number, Mr. Burian's answer is unequivocally clear, "Absolutely not."

And it should be clear because Mr. Klein corroborated that version of that meeting. When Mr. Klein was asked the question, "Isn't it true that you never told them the forty-four to forty-five was a liquidation valuation?" he answered, "I don't believe I would have said that. And I don't believe, per se, that it implied a liquidation. The numbers that were given to me related to Barclays' estimates of the value at the moment in time in that market condition." Interestingly, Mr. Klein refers to those values as "Barclays' estimates" not Lehman's estimates.

Now, speaking to the upper right-hand corner of the folder, Mr. Klein advises that the liabilities assumed in the transaction will total approximately forty-nine billion dollars. And Mr. Burian testifies that Mr. Klein told him, "[Y]ou guys are doing two plus billion better than you ever thought and you should be thanking us and not causing trouble."

He was comparing the forty-nine to the forty-seven on the left-hand side of the folder.

This meeting among Mr. Klein, Mr. Burian, Ms. Fife, Mr. Miller, it ends at approximately 3 a.m. on Monday morning, September 22nd shortly before the transaction closes. And just a few hours later, Mr. Burian sends the committee a memo. And that memo corresponds directly with Mr. Klein's notes on the folder and Mr. Burian's testimony concerning that conversation. And this memo is Mr. Burian's most contemporaneous and comprehensive set of notes about these events. In that memo, he tells the creditors' committee in recounting the Klein conversation, "The bottom line netting appears to the following: the total purchased assets were booked at approximately 49.4 billion but dropped in value to about forty-five -- forty-four to forty-five billion. Barclays was then given additional assets of 1.9 billion to be included in the deal prior to the Friday hearing. All-in, approximate value of forty-seven billion. They are forgiving the Fed loan of 45.5 billion and assumed liabilities of 4.25 billion for a total of forty-nine plus billion. Depending on how they do liquidate in the book, they will make or lose money." Those are Mr. Burian's notes, a memorandum to his clients hours after the Klein meeting.

And when Mr. Klein was shown this memorandum, he confirmed the symmetry between the substance of his

conversation with Mr. Burian and with Mr. Burian's description. And when he was asked if there was anything in Mr. Burian's recollection of his discussions and explanations that was inconsistent with Mr. Klein's recollection of that meeting, Mr. Klein said, "There was some phrasing that might be different" but he acknowledged that it was a reasonable summary.

The bottom line, Your Honor, when Mr. Burian leaves Weil Gotshal in the early morning hours of September 22nd, his view is that "Essentially this is very, very similar to what Jim Seery told me before the court hearing, very similar to what Lori briefed people in a little scrub before the hearing started and very similar to what Weil Gotshal represented to the Court would be the transaction. This is pretty close or dead on to what I was expecting to hear."

Now, one of the arguments that Barclays raises is that the committee consented to post-hearing modifications to the transaction. And the evidence doesn't support that conclusion at all. In fact, again, Mr. Burian's contemporaneous memorandum that was sent to his clients hours after the Klein conversation is clear that he acted in accordance with his client's instruction. "We did not consent. We said we understand what they are telling us and expect to see computer runs of all transfers at some point in connection with the closing documentation. If this is the deal, it sounds consistent with the court proceeding. If this is not what

actually happened, they will be hearing from us or from the LBI estates."

And similarly, committee counsel, Mr. Luc Despins, when asked the question, "Now, the transaction itself closed sometime in the early morning of London, correct?

"A. That's what I understand.

"Q. Were you and other committee professionals present when the deal officially closed?

"A. No."

And then proceeds to explain: "We didn't want to be deemed to have acquiesced or consented to this in any way being there at the closing."

"Q. Did you ever indicate to anyone after the closing that the committee had consented to the transaction?

"A. No."

At this point, Your Honor, I would turn to the second period that we've identified, the trust but verified period which takes place after the closing concludes on September 22nd through the December settlement. And immediately after the Klein meeting, the committee professionals set out to obtain the reconciliation with respect to the representations that were made to them over the closing weekend and to the Court. And the committee's expectation was that it would receive a line by line set of marks showing the CUSIP, the mark ascribed, the date of the mark and the method and manner of marking and

that that reconciliation would be consistent with everything the advisors had been told at the hearing and over the closing weekend.

And one of the things the committee did was immediately request a copy of the final schedules. And Mr. Despins e-mailed Mr. Miller on Thursday, September 25th, shortly after the closing, and told him that his partners had made several requests for the asset schedules referred to in the asset purchase agreement and had received no response. Mr. Miller assured him that the schedules would be furnished ASAP. And in fact, a copy of the schedules was transmitted that day on September 25th.

Now, two points about this schedule. First, it's caveated in a cover e-mail. It says, "These are not necessarily the final reconciled lists of what was sent over to Barclays. We are told, however, that they're very close."

The second point is, the value, the market value, that appears on these schedules is the exact same -- well, extremely close -- 49.9 billion dollar market value that was on the schedules we had received the weekend before and were told were out of date schedules and incomplete schedules.

Now during this period of September and October, the committee continued to set out to get a reconciliation to try to reconcile the differences in the amounts that they had been told with what was said to them in the Klein meeting and what

was said during court. On October 8th, the committee met with Alvarez & Marsal and the debtors' other professionals as part of a regularly scheduled meeting. And the transaction was discussed at this meeting. And the committees advisors who had been asking for a reconciliation since the closing, raised again the issue of the need to get that reconciliation. And following this meeting, they also briefed committee counsel on the issue for purposes of allowing committee counsel to try and obtain diligence through LBHI's counsel. And consistent with that approach, in early October, committee counsel reached out to LBHI's counsel to schedule a meeting to discuss these issues and they met some resistance. LBHI's counsel said, "I'm really at a loss to figure out why you and the other committee professionals are spending so much time on the Barclays sale. What could you or anyone for that matter do even if it turned out that the assets turned out to be greater?"

Another problem that's impeding the ability of the committee to get a reconciliation during this period of time is a significant issue facing the estate, the inability to access information because after the Barclays sale systems and the institutional knowledge were transferred to Barclays as well as the knowledge of the sale transaction. And while there was a transition services agreement that was in effect, disputes over compliance with that agreement unfolded and that ultimately almost led to litigation. But at the time, the estates and A&M

had indicated to the committee during the October 8th meeting that they agreed a reconciliation should be pursued. But at the time, the estates in and of themselves were hamstrung by the inability to access information.

And it's against this backdrop that the December settlement motion is filed. And the papers that are submitted in connection with that settlement, specifically Ms. Leventhal's declaration, describe a transaction different than the one described to the Court and to the committee. Ms. Leventhal's declaration states that LBI was to provide Barclays with approximately 49.7 billion in securities in return for forty-five billion in cash. And that representation didn't square with the 47.4 told to the Court and the committee or the 45.5 billion number ascribed to the repo securities. And in response, the committee filed a limited objection arguing its investigation of the transaction was ongoing. And the committee also asked that information be provided to the committee so to continue with that investigation. And the committee's limited objection advised clearly of its five billion dollar issue. The question that it had about the five billion dollars between the 49.9 it was told and the forty-five in the Klein conversation and how the committee advisors were told that issue was resolved the night of the closing and how that explanation contradicted Ms. Leventhal's declaration which listed the value of the assets at 49.7.

And the committee's objection was not well received, Your Honor. In point of fact, in an e-mail from Barclays' counsel, Barclays' counsel states, "As to the creditors' committee, we think that the e-mail should go on to say that the settlement parties are not willing to agree to other demands of the creditors' committee re an order requiring delivery by January 15 of a vast amount of information relating, in general, to the details of a sale or assets to Barclays Capital. Nevertheless, the settlement parties are willing on an informal basis to discuss with the creditors' committee after the first of the year reasonable requests for information concerning the sale that it has sought from LBHI and been unable to obtain from LBHI."

Now, one of the positions that Barclays asserts in this litigation is that the creditors' committee's rights were released in the December settlement. And interestingly, Barclays' counsel stated on the record during the hearing of the December settlement, "With regard to the creditors' committee objection, Your Honor, we regard the creditor committee objection as not germane to your decision whether to accept this motion and approve the settlement. They want to exhume information related back to the sale that is not pertinent, does not bear upon the question before you today." And in point of fact, they confirmed on the record the reservation of rights that the committee had obtained in the

order. When counsel for JPMorgan Chase advised the Court, people would remain free to pursue claims if they feel there is something in the overall sales transaction which gives rise to a claim, Barclays' counsel confirmed, "the order that the trustee has put before you and which we've reviewed and to which Mr. Miller referred preserves rights as Mr. Novikoff just explained."

At no point did Barclays advise the Court that the committee's rights would be released if the settlement was approved. At no point did Barclays advise the Court that the committee could not assert any claims because it failed to appeal from the sale order, because it had waived its claims or that the committee was otherwise estopped from asserting claims with respect to the sale order.

Now, turning to the final chapter in our timeline, attempts at cooperation develop into litigation. At the December hearing, the Court suggested that the parties work cooperatively to obtain information about the sale transaction, the committee and Barclays. And we pursued on that -- we embarked on that effort by sending a letter to Barclays' counsel four days after the December 22nd hearing on December 26th that contained a list of information requests. And in February, Barclays' principals and counsel and the committee's financial advisors and attorneys had a meeting. And this was an informational meeting. This was not a meeting to exchange

litigation positions. And early, Barclays didn't exchange its litigation position with the committee. And the committee's position was not a mystery to anyone 'cause it had been stated on the record at the December hearing a month before. But at the conclusion of this meeting in February, no reconciliation is provided and, in point of fact, the committee's professionals emerge with additional questions. And that's reflected in a February 10th letter that we sent after the meeting outlining conditional and refined information requests. Now, ultimately, there's some disagreement between Barclays and the committee about the method and manner of producing documents that the Court should respond to these requests. They're initially produced in March and through April and May and the parties negotiate changes to the format and the production.

But at the same time, the estates themselves, LBHI, were gearing up. They initiated Rule 2004 discovery in which the committee joined in May. And after the committee joined in LBHI's motion, Barclays objected to that joinder and tried to block the committee accessing Rule 2004 discovery which the Court did not sustain. But thereafter, discovery commenced over the summer and these motions were filed in September.

Barclays asserts in this case that the committee did not timely seek Rule 60 relief. Starting with the closing weekend, going to the Klein conversation, the committee did not

come to court on Monday morning to halt the sale transaction. As far as there was concern at that point in time, it was advised of a going concern sale. It was never advised that securities were being transferred to Barclays at liquidation valuations. In point of fact, Mr. Burian testified that the representations made to him by Mr. Klein during that meeting squared with what was said in court and he had no way to verify those representations but he did set out to do so immediately. And in the September and October months that followed, the committee was pursuing their reconciliation. It was meeting some resistance in doing so and it was hampered by the estate's inability to access its own information systems. I think Mr. Despins during the trial testifies quite clearly to the committee's posture during this period of time.

"Q. [D]id you ever consider going back to the Court and saying, in substance, Your Honor, you told him not to make any changes without our consent. They went ahead and did it anyway. We objected. Did you ever consider doing that?"

Mr. Despins describes the committee's posture:

"Well, I knew that I could read the document and say we're changing that and we're changing that section, et cetera. But what we don't know is the impact of those changes on the value received by the estate. So I don't want to run to court on a half-baked theory that there are some changes but, frankly, Judge, I don't understand what the impact of those

changes are. [W]hat I'm telling you is that we wanted to have the schedules. We wanted to understand what happened to those schedules and the marks. And obviously, the game plan was -- after I gained a full understanding of that and briefing the committee, if warranted, that we would be eventually going back to the Court."

Similarly, Your Honor, the committee is not timing the market with this motion. We did not await a market move to file the Rule 60 motion. Mr. Burian testified clearly, "I just don't know what to say anymore. I mean, nothing could be further from the truth. It's completely and absolutely not true. I can tell you I can tell you categorically that we were pushing for discussion, investigation, reconciliation of this transaction long before the markets recovered. I could tell you that I've been a primary person at Houlihan Lokey dealing with these issues, and I have never, not once, with anyone, on my side or on the company's side...ever had a conversation regarding ha-ha, market's been up, now is the time to pounce."

Your Honor, the committee did not bring this action lightly. When does a statutory fiduciary for unsecured creditors bring a claim against the public reporting back alleging misstatements and misrepresentations were made in connection with the largest bankruptcy sale on record? The short answer is when it has an awareness and an understanding of the issue, when it reaches a conclusion about the issue and

when it has facts necessary to support that conclusion and not a moment before. And if you look at the landscape, over time, that shows that that is exactly what the committee did in this case.

As of the 18th of September, we knew about a balance going concern transaction, we knew about the emergent nature of the transaction and we knew that the assets were value based on book value. On the 19th, we were told that there was a decline in the market value of the securities to 47.4. On the 21st of September, we received schedules at 49.9 and were told they were out of date. And on the 22nd of September, we received an explanation that the liabilities were 45.5 plus cure and comp and the value of the assets was forty-seven. And that explanation squared with what was said to the Court. And thereafter, Your Honor, at that point in time, we did not come back to court to stop the sale. What we were told was consistent with what the Court was told. Thereafter, on the 25th of September, we received schedules that were the same schedules distributed the weekend before that we were told to ignore. On the 8th of October, we had a meeting with the debtors and we reiterated the need to focus on a reconciliation. On the 10th of October, we went to Weil Gotshal requesting a meeting to discuss the issue. Was not well received. And in October through December, the estates were unable to access information to a point where it

threatened a lawsuit. At this point, we're still not prepared to go to court. We're still seeking a reconciliation. That's the posture. Thereafter, we received the December settlement in cooperation to obtain information as suggested by the Court. And we proceed down that path. We do, in good faith, meet with Barclays in February. In March, we deal with document production issues. And then in June of 2009, Rule 2004 discovery is underway.

And at that point, the estates had come to court and we joined in their request to come to court and reseek discovery. But we still don't assert claims because it's not until 2004 discovery that critical features of the sale transaction that were never disclosed emerged. The existence of a five billion dollar discount; attribution of liquidation values not mark-to-market values on trading assets; an insisted of -- on a day 1 acquisition gain as an imperative and a precondition to the sale; and the overstatement of cure and compensation liabilities. At that point, Your Honor, we returned to court and assert the claims and filed the instant motion.

We were not aware of this information that was revealed in discovery. That information was newly discovered by us and we were justifiably ignorant of that information. We didn't discover it fortuitously or by happenstance. We discovered it by pursuing a reconciliation persistently from

the time of the closing to the time that we filed the motion.

The committee did everything it possibly could under the circumstances. It believed in the representations that were made to the Court. And while it trusted what it had been told into the closing weekend, it saw promptly to verify those representations. It was incumbent on Barclays, not the committee, to return to court and advise of the material aspects of the sale transaction and the extent to which it differed from what the Court was told at the sale hearing. Barclays had every opportunity. The Court made itself available on an unlimited basis irrespective of the hour that weekend and for that exercise. And why did the Court do this? Because the Court knows that the sanctity of a sale order is critical to the purchaser. But to get that security blanket, a purchaser needs to ensure that it tells the Court what is going on. You cannot demand integrity of a sale order if you don't have integrity in attaining it. Barclays declined the Court's invitation to come back to court that weekend. The committee submits the consequences of Barclays' inaction should be borne by Barclays not by the estates. The failure to adequately disclose material aspects of the transaction militates strongly in favor of a warning Rule 60 relief from the sale order especially against a purchaser that expressly assumed the risk of its own recalcitrance.

Your Honor, in conclusion, the Court has a difficult

decision to make. One is to revisit a sale order approving a most historic transaction. And there's an important policy of finality with 363 sale orders. That's Barclays' whole case. But there's another policy at issue. And this is the case that should stand as a symbol for all to follow. The policy is that no matter how critically a debtor needs to sell assets, no matter how many good reasons there may be, this Court must be given full disclosure. This Court is not a rubber stamp. It's not a theater of entertainment or mere ceremony. This is a federal court. And those who come before the Court owe the Court a duty of disclosure of integrity. That they failed to comply with that obligation, they face the consequences not innocent creditors.

Ruling this way will actually advance both policies at issue. The sanctity of sale orders will be defended and upheld but only if disclosure is properly made. Let this case show how serious these issues are and let us all learn from it and be guided in how to behave when we come to bankruptcy court. Let it be cited often.

And unless Your Honor has any questions, that concludes my presentation. Thank you.

THE COURT: Thank you. Are we ready to go with Mr. Maguire's close?

MR. MAGUIRE: We are, Your Honor. The parties had suggested we had reserved, I believe forty minutes for the

trustee's presentation and with an additional twenty minutes for rebuttal at the end of the day. We had suggested this might be a good time to break for lunch. But as the Court pleases, we can either take that break now or I'll proceed.

THE COURT: All right. Well, let's get a sense of Barclays' time for close as well. I just want to see how this all fits. Mr. Boies, can you give me an estimate if your closing will be equal in length to the aggregate of all of the closes that I will have heard by the time you start?

MR. BOIES: It will be, Your Honor.

THE COURT: I've already expected that. My suggestion is that we break for lunch but that we come back a little bit earlier and that we start at 1:45. That will give us our typical hour and a half but we'll also have a little bit more time in the afternoon during the early hours of the afternoon. That works for the better. We're adjourned till 1.

MR. TECCE: Thank you, Your Honor.

(Recess from 12:15 p.m. until 1:48 p.m.)

THE COURT: Be seated, please. Good afternoon.

MR. MAGUIRE: If it please the Court, Bill Maguire for the SIPA trustee. Your Honor, we've taken to using the shorthand for these proceedings as 60(b). The trustee's claims with respect to the disputed assets, however, are first and foremost, to enforce the parties' contract and to enforce this Court's sale order. In short, what the trustee is seeking to

enforce is the transaction that was presented by the parties to the Court and was approved by the Court at the sale hearing.

On those disputes assets, I'd like to start with the 15c3-3 assets. And I've taken the liberty of distributing binders of tabs that we made --

THE COURT: I'm not surprised.

MR. MAGUIRE: The 15c3 account takes its name from the SEC Rule, 15c3-3, and that's the rule that requires a broker-dealer to calculate what it needs to pay customers their property, to set that property aside, to keep it segregated in a restricted account. It can't be used for any other purpose, not subject to any liens. And all of this is subject to the oversight of the SEC.

The parties were clearly aware of the regulated nature of this account. And the correspondence that the Court has seen with the SEC that week shows that the Lehman participants, in particular, were sensitive to the fact that the SEC was all over this account.

Now, in tab 2 of the binder that we've provided Your Honor, you'll see the words of the clarification letter. This -- the history of this was that the 15c3 account was added late in the deal. It's not in the asset purchase agreement, as Mr. Gaffey mentioned. It is added at the Friday asset scramble that he discussed. And it's not disclosed to the Court. When Harvey Miller finds out about it, there is a discussion in the

hallway at his offices. That account at the time had 1.7 billion dollars in it. Harvey Miller testified and explained to Your Honor that of that one billion dollars was cash and there was no way that could go to Barclays because of the representation that had been made to the Court at the sale hearing.

With respect to the 769 million dollars of securities, the resolution of the hallway discussion, that argument or debate that he testified about, was that Barclays would get the 769 million dollars of securities that were in the account but only if it were lawful. What Barclays got was a contingent right. And following that hallway conversation, Weil Gotshal provided Barclays with a draft that reflected that. And what we have on the screen here is the draft which reflects, in black, the writing of the clarification letter prior to the hallway conversation and, in green, the language that Weil Gotshal added after the hallway conversation. The two words in red were subsequently added by Barclays.

The draft that Weil Gotshal provided explained that this was a contingent right. It said, this was -- Barclays got this "to the extent permitted by applicable law". And it describes what the asset was: 769 million dollars of securities held in the 15c3 account on the date hereof, the closing date. Of course, Lehman could not possibly transfer anything from this account on the closing date. It would take

time to determine whether, in fact, there was an excess and to run that by the SEC. And that would take time. So the delivery of this is made as soon as practicable after closing. Now that gave rise to another subsidiary issue. If by the time the account can be accessed the particular securities are no longer there, they've been replaced if they'd matured, they rolled over, then Lehman needs the ability to provide substitute securities from within the account. And that's why the draftsmen added the words "securities of substantially the same nature". That's the draft that Weil Gotshal provided to Barclays.

Now Barclays deposed Robert Messineo who is Harvey Miller's law partner who assisted him in drafting the clarification letter, specifically about this language, "securities of substantially the same nature". And his testimony we've provided in tab 3. We also have it -- it's about one minute long by way of video which we can show Your Honor:

(Begin playing videotaped excerpt)

Q. So do I understand your testimony to be that you believe that the provision was necessary because there may have only been 769 million dollars in securities in that customer reserve account on the date of the agreement?

UNIDENTIFIED SPEAKER: Objection to form.

A. I wouldn't say it that way. What was described was that

Barclays was to get 769 million of particular securities that existed in particular accounts on a particular day. And then it went on as it needed to in order to make sense to say that substantially the same securities since those particular securities over there on that day may not be there on the day when you talked about the account being accessed which is going to be in sometime in the future when favorable conditions are satisfied.

(End playing of videotaped excerpt)

MR. MAGUIRE: Now Barclays claims that the contract should be read very differently from what Mr. Messineo intended. Barclays asserts that the contract gives Barclays an absolute unconditional right to the 769 million dollars. And they say that that right, that unconditional right, was given to them by Harvey Miller in the hallway argument or debate. The problem with that is that the evidentiary support for it is given more than wishful thinking.

The next tab, tab 4 in the binder, collates that evidence and we have the particular pieces of testimony behind the cover slide in that tab. We asked Harvey Miller at trial, did he give such an unconditional absolute commitment to Barclays? He said "Absolutely no commitment. Absolutely not." On the other hand, Barclays' witnesses, Victor Lewkow, said that such a commitment was given to Michael Klein, his client. But he couldn't recall who it was who gave the commitment and

he couldn't recall what they said. His partner, Mr. Rosen, admitted that his conclusion was based on little more than an inference from some kind of facial gesture, some grunt or not that had been made maybe by Harvey Miller, maybe by one of his partners. And he, too, did not recall what was said. And Michael Klein was the supposed recipient of Harvey Miller's largesse and he had admitted that he just didn't consider whether there was any unconditional commitment during the hallway conversation.

If we go back to tab 2, and that's the language of the clarification letter, the draft as it was provided back to Barclays by Weil Gotshal, the Barclays witnesses admit that when they got the draft, it didn't work. They admit that they expected an absolute unconditional right and in their words, "This didn't work." They admit, they didn't understand it. But they also admit they didn't go back to talk to anyone, Mr. Messineo, Harvey Miller, anyone at Weil Gotshal to ask what was intended by all of these words. Instead, what they did was they added two words which we have here in red, "and value". The problem with that is that adding those words doesn't change the meaning at all. It's entirely consistent with what Mr. Messineo was saying. If you have to replace the securities then you're going to replace them with similar securities of equal value. So it doesn't in any way change the contingent nature of this right. The Barclays witnesses all say they

believed they had an absolute right to 769 million dollars of securities. But apparently, they never asked themselves or anyone else, if that's what the parties intended, why don't they just say so. Why do we have all these extra words?

If we turn to tab 5, we see that in addition to the problems that Barclays has with the words of the contract and with the lack of disclosure to this Court and with the testimony of Harvey Miller, we also have Barclays' admissions consistently in the months after the closing. Barclays reported to its tough management that this was an asset that was contingent. It was subject to regulatory issues.

Of particular significance here is the October 14 report that was made to Barclays' board of directors. And in your tab, just past the cover page, we have that report to Barclays' old committee of imported directors, Movants' Trial Exhibit 436. You may recall the chief financial officer, Patrick Clackson testifying about how management vetted that report to make sure that management was providing the most reliable to the Court. Now when Barclays consistently reported internally to its own top management and to its board that this was subject to regulatory approval, they were clearly acknowledging the fact that this was an -- this was a contingent right, it was a conditional right and it was not an absolute right.

Your Honor, that brings me to the disputed asset,

Lehman's margin assets which we start at tab 6 of our binder. What we've put up here are what we believe are three fundamental and dispositive facts with respect to the margin assets. They weren't in the deal. There was no disclosure that any margin assets were going to Barclays. And there was no approval of any such transfer. We start in the next tab with the fundamental fact that these margin assets were simply not in the deal. Lehman's president, Bart McDade, testified they were not in the deal. And the parties' contract, the asset purchase agreement, expressly excluded Lehman's cash and cash equivalents. The parties' contract also excluded all Lehman assets primarily related to its derivatives contract.

Now, in the next tab, we have the testimony of Bart McDade. He testified that Lehman's margin assets were not intended to be included in the transaction and that he never authorized any agreement with anyone at Barclays to include any Lehman cash margin in the sale. That was on direct examination. On cross-examination, he confirmed that that testimony was accurate. And he actually went a little bit further. And he said, he wouldn't abuse those assets because he wasn't confident we had those assets to give. And when you consider Lehman's obligations to the exchanges and its obligations to its customers, that's entirely understandable.

Barclays has suggested, well, Mr. McDade just wasn't involved in negotiations about margins. And I think that's

true. Mr. McDade was not involved in any negotiations about margin because there weren't any. The notion that, as a general matter, Mr. McDade was above it all was scotched on Barclays' own case, the very first witness they presented, Mr. Shapiro. In the next slide, we have Mr. Shapiro's testimony on direct being questioned by Barclays when he specifically testified to how deeply involved in the negotiations Bart McDade was.

Mr. McDade was not involved in any negotiations about margin because there weren't any. And in the next slide, we confirmed that with Barclays' negotiators. We asked Mr. Ricci, and he confirmed, that he certainly never discussed including margin in the sale. And he answered, "Personally." We tried to push him a little bit more because he was, after all, Barclays' 30(b)(6) witness. And he didn't want to go beyond "Personally" but he was admitted he wasn't aware of any other discussions that anybody else had on the subject.

Jonathan Hughes, Barclays' general counsel, suggested at one point that there might have been some kind of oral agreement on the subject of margin. But when pressed, he acknowledged he had no knowledge of that whatever.

Archie Cox admitted he certainly didn't remember any discussions about Lehman margin during the week. The same can be said of all of the other Barclays witnesses. Barclays failed to present any witness who could say there was any

negotiation about putting Lehman's margin assets in the asset purchase agreement.

And the contract reflects that. The next tab is the contract, the asset purchase agreement. At the top, we have the definition of "purchased assets". And, of course, Barclays' witnesses loved to say that Barclays was acquiring all of the assets of the business. What they all left out was that that was subject to a very important exception: excluding the excluded assets. And there are two critical exclusions here. The first exclusion is Exclusion B and it excluded all of Lehman's cash, cash equivalents, bank deposits or similar cash items.

Now we had various Barclays witnesses who testified about the representations that were made to the Court about no cash going to Barclays and how they thought that was fine and consistent with the deal. But at the same time, they thought there was some kind of cash that could be going to Barclays. The contract cuts through all that. It doesn't talk about one kind of cash, another kind of cash, this cash, that cash or the other cash. It excludes all cash. All Lehman cash and cash equivalents.

The other critical exclusion is Exclusion (m). There's no real issue here concerning all assets primarily related to the I&B business. There very much is an issue here concerning all assets primarily related to Lehman's derivative

contracts. And in the next tab, we have Barclays' take on that. At the very top, we quote directly from Barclays' reply brief at paragraph 53. Barclays says "Subsection (m)" -- that's what they're calling this Exclusion (m) -- excludes all assets primarily related to derivatives contracts. That's a direct quote from Barclays' reply brief. Even the three little ellipses is direct from their reply brief. Now what is the significance of this? The significance of this is that Barclays' expert on derivatives, their outside lawyer admits that exchange traded derivates are derivates contracts. He admits that Lehman's margin at the Options Clearing Corporation was primarily related to the exchange traded derivates. And the same with respect to all the other clearinghouses.

So the disputed margin here is an asset that is primarily related to Lehman's derivates contracts. That's exactly what Exclusion (m) says.

Now, in the next tab, 13, we have where Mr. Rosen suggested that he reads Exclusion (m). Even though it's an unqualified exclusion, he reads it as if it were limited, limited to over-the-counter derivatives as if the limiting words, "over-the-counter", were somehow inserted into Exclusion (m) right before the words "derivatives contracts". And the problem with that, the contract doesn't contain any such limitation, as Mr. Rosen admitted. He acknowledged he could not argue with us about that. Those words are not there. And

he acknowledged -- he said, "This was done" -- this Exclusion (m) was done -- "before I ever saw it." In fact, Barclays presented no witness on this Exclusion (m). And we respectfully submit that the exclusion, as written, is entirely consistent with the testimony of Bart McDade that Lehman margin assets were never intended to be part of the deal. They were excluded.

As against the testimony of Bart McDade and the words of the exclusions for all cash and all Lehman margin assets, we have the testimony of Barclays. We served a 30(b)6) notice on Barclays. Barclays designated Mr. Ricci as its corporate designee on the subject of disclosure of where it was disclosed that Barclays was acquiring Lehman's margin assets. As Mr. Ricci acknowledged here, he got the notice, he met with his counsel, he met with other Barclays executives. And a month or so after we served the notice, he testified at his deposition and he repeated it here. He said there were three disclosures: one was the accounts that were published in 2009; another was a clarification letter over the weekend; and the third, and the only one that existed at the time of the sale hearing, he said was the asset purchase agreement. So we asked him, where in the asset purchase agreement is there a disclosure that Barclays is getting Lehman's margin. And he pointed us to "Purchased Assets", to the definition and to subparagraph (d), the definition of the long positions. And within that, to

three words: "exchange traded derivatives". And he testified that that was the disclosure that Barclays had made that it was acquiring Lehman's cash, cash equivalents and government securities. And he confirmed that there is no other disclosure that Barclays made in the asset purchase agreement other than those three words.

Of course there is a difference between telling people Barclays is taking exchange traded derivatives and telling people Barclays is taking billions of dollars of Lehman's cash, in cash equivalents, Lehman's margin assets. And that's a difference that Mr. Ricci, to his credit, Acknowledged. He acknowledged he understood the difference between exchange traded derivatives, on the one hand, and Lehman's margin assets on the other.

Now, of course, there was no disclosure of Lehman's margin assets at the sale hearing on Friday night. On the contrary, the Court was repeatedly told that there was no Lehman cash going to Barclays. That's what the Court was told; that's what the trustee was told. That's what the world was told. After the sale hearing, we have this chronology where on the Saturday, Barclays learned that Lehman had billions of dollars in cash and cash equivalents at the OCC. Within hours, Barclays proposed adding Lehman cash and cash equivalents to the deal. Weil Gotshal rejected that proposal. Barclays appeared to accept Weil's deletion. And then right before the

closing, Barclays provided the famous parenthetical. And after confirming how much cash it was going to get from the OCC, signed the transfer and assumption agreement.

The next couple of tabs, we walk through that chronology. We start in tab 16 with Barclays' proposal to add margin. What Mr. Rosen did was propose a carve-out to the exclusion for cash. So after the exclusion for cash, cash equivalents, bank deposits or similar cash items, he put in language that would have kept in the deal all of Lehman's cash and cash equivalents at clearing agencies and clearing organizations. It specifically mentioned margin. It specifically mentioned guaranty funds deposit. That's the proposal that Weil Gotshal rejected. And in the next slide, we show Weil Gotshal's deletion. Weil kept the exclusion for cash, cash equivalents, bank deposits and so on. It deleted everything to do with clearing agency, clearing organization, everything to do with margin and guaranty funds deposit.

In the next slide, we show the e-mail that Ed Rosen's partner, Michael Mazzuchi, circulated just after 6 a.m. on Monday morning, right before the closing. And behind this slide, we have the draft, that draft. He says "The current form of the clarification letter is attached. The significance of this draft is that it was a clean draft that reflected the Weil Gotshal deletion." And the draft contained no parenthetical concerning exchange traded derivatives. So it

looked, as of 6:03 a.m. as though everybody was on board. There was no Lehman cash or cash equivalents in the deal.

Mr. Rosen, however, was not on board. And in the next slide, we have his testimony where he admitted he was specifically concerned about negative inferences that could arise from Weil's deletion of his carve-out. And so, he proposed the famous parenthetical. We have that in the next slide.

Now, a question here is what does this obscure parenthetical mean? And in opening, we suggested that that could be read simply as a reference to customer property. Barclays, of course, says we're completely wrong about that. And in the next slide, we put forward Barclays' position pre-trial. Pre-trial, they said, the parenthetical cannot logically be read to apply at all let alone solely the customer property. Cannot be read to apply at all to customer property. Well, we never heard that during trial. There's not a single witness who said that. In fact, when Barclays put its witness, Mr. Rosen, on the stand, Barclays conceded on direct examination in its own questioning of Mr. Rosen that the parenthetical could indeed be read to apply to customer property. And all they ask Mr. Rosen to say was that it's not limited to customer property, to customer accounts, to customer margin. Barclays had to make that concession. And the reason they had to make that concession was because Mr. Rosen was

already on record. His deposition transcript is in the trial record and it's in our next tab. And I asked him at his deposition, what did he think his parenthetical was picking up. And the first thing he told me was customer property.

So we don't believe there's any genuine dispute that this parenthetical can be read and should be read to apply to customer property. The only dispute is whether, as Barclays claims, it should also be read to apply to Lehman's cash and Lehman's cash equivalents and Lehman's margin and Lehman's clearing fund deposits, all the terms that were in the original Barclays proposal and which Barclays cut out of the parenthetical all of the terms that Weil Gotshal rejected.

Now we say that having taken out all of those terms, and we show them in the next tab, and having admitted that it took out those terms expressly -- and those were Mr. Rosen's words -- "to avoid becoming embroiled in extensive negotiations". Having taken all of those terms out, what Barclays is left with, at best, is an ambiguous parenthetical that it drafted. If Barclays wanted this parenthetical to mean more, if it wanted it to mean Lehman's cash and cash equivalents and margin and bank deposit and guaranty fund deposit, then it should have said so. It should have made that clear. And as I think is evident from the fact that Barclays can't keep its own story straight between its own reply brief when it said this parenthetical cannot apply at all to customer

brief and its own testimony at trial which concedes that it absolutely can be, I think it is abundantly established that there was nothing clear about this parenthetical.

The final point I would make, Your Honor, on the subject of Lehman's margin concerns the subsidiary agreement between Barclays, the trustee and the Options Clearing Corporation. And that is the so-called transfer and assumption agreement. It's the agreement that the trustee's representative, Jim Kobak, signed while he was here at the sale hearing after being told that there was Lehman cash going to Barclays.

Barclays maintains in its briefing that "our contention that the transfer and assumption agreement was not approved by the Court is incorrect." They say that paragraph 3 of the sale order explicitly approved "any additional instruments or documents that may be reasonably necessary or appropriate to implement the purchase agreement." What Barclays omits from that are the following, we submit, important words: "provided that such additional documents do not materially change its terms". We respectfully submit that to the extent that Barclays relies on the transfer and assumption agreement to claim 2.3 billion dollars of estate cash and cash equivalents, that agreement materially changes the purchase agreement and was never approved by this Court.

That brings me to the Lehman assets at the Depository

Trust Clearing Corporation. In our next tab and behind the slide, we include the evidentiary record that covers how the clearing corporation was concerned about its massive exposure to Lehman; how it rejected a 250 million guaranty unless Barclays put up additional collateral; how the clearing corporation threatened to cease to act when additional collateral became unavailable; how the clearing corporation never released its rights in the clearance box assets; and how its representative, Isaac Montal, testified to the discussions that the clearing corporation had with Barclays on Sunday concerning what assets Barclays was taking and what collateral it was providing; and finally, and most importantly, how the clearing corporation documented Barclays' agreement that it was not going to take any of the clearance box assets.

The record also shows, and we have a slide in tab 26, how Barclays' Stephen King valued these assets at nil; how Barclays did not want to lose the sail over a problem with the clearing corporation. In fact, you may recall that Bob Diamond specifically warned Rich Ricci not to let anything fall through the cracks. And Mr. Ricci said that he put Gerard LaRocca in charge of getting a deal with the clearing corporation. Barclays ultimately broker the impasse with the clearing corporation by agreeing not to take any assets.

Now, in our next slide, we cover the testimony of the clearing corporation's witness, Isaac Montal. He testified

about he and his colleagues, including their general counsel and their outside counsel, Shelly Hirshon, were involved with discussions with Barclays on the Sunday including with DTC's own board member, the Barclays executive, Gerard LaRocca, about how the clearing corporation never agreed to release its rights and how they continually pressed Barclays to explain what assets Barclays wanted to take and what collateral Barclays proposed to provide.

Ultimately, the discussions resulted in the critical call in which, Mr. Montal testified, they were assured by Barclays that they weren't taking anything. And he explained why that was so important to the clearing corporation. It ensured that the assets would be available in the Lehman accounts to settle the open obligations that existed. So the clearing corporation was looking to those assets as a source of protection.

Mr. Montal testified how the clearing corporation documented the deal. And we have that in the next slide. The contract -- and this is in tab 28 -- yeah. The contract specifically provided that these assets were excluded assets within the meaning of the asset purchase agreement. Barclays maintains that these were just liabilities. They were simply excluded liabilities. Well, not so. The parties expressly use the term "excluded assets" within the meaning of the asset purchase agreement. Barclays claims, no, this is just a

reference to the accounts. It deals only with accounts not with the contents of the accounts. Well, the contract directly refutes that.

As we show in the second excerpt here, the contract expressly provided that the trustee authorized DTC to deliver securities. Securities not accounts. We're talking now about the contents of the accounts, the specific assets in the accounts are the securities to which DTC is looking to for protection. How could the trustee authorize the delivery of those securities if they all belonged to Barclays?

Now, in the next slide, we deal with a gap in the trial record. Barclays has Mr. LaRocca on its witness list but it never called him live to respond to Mr. Montal's testimony. So all we have is Mr. LaRocca's deposition. At his deposition, Mr. LaRocca confirmed that he was Barclays' global head of operations, that he was a member of the board of DTC. He admitted that he signed the DTC letter agreement. And that's about all. He didn't recall signing it. When we showed him the critical sentence that designated these as excluded assets within the meaning of the asset purchase agreement, he couldn't recall that language and he couldn't tell us what it meant.

The final point I would make on this asset, Your Honor, is that in opening, I suggested that the record -- the evidence would show that Weil Gotshal did not conform the draft clarification letter to the DTCC letter because Weil was

effectively a stranger to the DTCC letter. You may recall that Barclays objected to that. They said that wasn't true. They said that Weil Gotshal was all over the DTCC letter. So we asked Mr. Miller. We asked Harvey Miller, "Does the clarification letter reflect any conscious effort to conform that agreement with Barclays' separate letter agreement with the DTCC?" And Mr. Miller testified he didn't believe Weil Gotshal saw the DTC letter. We confirmed. We asked him, "Are you aware of any effort on the part of Weil Gotshal to conform the clarification letter to the DTCC letter?" And he answered, "Since we did not have the letter, I don't believe there were any efforts to do that."

Weil Gotshal was excluded from the DTCC negotiations. You may recall Jonathan Hughes, Barclays' general counsel, saying it was perfectly appropriate for Barclays to exclude Weil Gotshal from those negotiations. But having excluded Weil Gotshal from those negotiations, Barclays cannot now argue that Weil Gotshal was all over the DTCC letter agreement.

Your Honor, if you don't have any questions, I'll reserve the rest of my time for rebuttal later.

THE COURT: Okay. By my math, the movants have used three hours and twenty minutes of time. Do I understand that you are collectively reserving forty minutes?

MR. GAFFEY: I believe that's right, Your Honor.

THE COURT: And that you will allocate that in

whatever way you deem appropriate at the time of using the rebuttal should you choose to use the rebuttal?

MR. GAFFEY: Yes, we will, Your Honor.

THE COURT: Okay. Mr. Boies, you're up.

MR. BOIES: Thank you, Your Honor. We, too, have books which I also apologize for not being as efficient as last counsel in having such a nice slim book.

(Pause)

MR. BOIES: And I have a separate book for Rule 60(b) motions and a separate book for our disputed assets enforcement motion. And then I have a very thin book that have some charts that we did over the luncheon recess.

THE COURT: You can distribute whatever you want to distribute in any order you choose.

MR. BOIES: Thank you very much, Your Honor.

(Pause)

MR. BOIES: Movant's counsel have been very direct in their arguments and I will try to be so as well. And in that connection, I want to note at the outset our view that as a threshold matter, it is very important for the Court to understand that the merits of movants 60(b) motion is based on two false premises about what the record before this Court at the sale order hearing shows.

THE COURT: It's a computer disk. I can't use it now anyway. It's on the floor.

MR. BOIES: First, movants' counsel says to this Court that this Court was not told information that the written record shows that the Court was told. Second, movants say to this Court today that this Court was told assertions that the written record shows this Court was not. Fortunately, what this Court was told, orally and in writing, is recorded. Counsels' call for arguments cannot change the black and white reality of what this Court was told. One of the most important things that movants' counsel want this Court to believe somehow is that it was not told about the clarification letter. And counsel made a statement that I actually wrote down and then went back and checked it on the live transcript. At transcript page 9, lines 21 to 23, counsel said, "The terms of the clarification letter were never disclosed to the Court."

Your Honor, let me begin with my chart 73 which I was going to get to a little bit later of which in view of counsel's argument I think it's appropriate to start with. And that has to do with the sale order that this Court entered. And as the Court will recall, the sale order expressly referenced the clarification letter and defined it as part of the purchase agreement. And the sale order expressly recognized that that clarification letter was in the process of being modified or amended or clarified. Those are the words from the sale order. And the sale order then went on to expressly approve the purchase agreement including the

clarification letter that the Court had specifically identified. That clarification letter was then filed with the Court. It was signed by the movants. It was, in fact, negotiated with them or in their presence. There is simply no basis, I suggest to the Court, to say to this Court today that this Court did not have the terms of the clarification letter. And this argument is an argument that arose not a week after the sale hearing, not a month after the sale hearing, but many months after the sale hearing during which time the clarification letter was repeatedly cited not just by Barclays but by the movants.

For example, let me go to my chart 214. The movants knew that the clarification letter was being revised throughout that closing weekend. And when it was finalized and executed on the morning of September 22nd, they made the decision not to object to it. Representatives of the debtor and the trustee executed the clarification letter. And Weil Gotshal then filed it with the court as part of the purchase agreement approved by this Court's sale order.

The committee, for example, going to number 215, knew and admitted that the changes to the transaction through the clarification letter would be documented after the sale hearing. For example, Mr. O'Donnell testified:

"Q. Did Milbank understand there was a provision to the sale order concerning committee consent to possible changes in the

purchase agreement?
"A. Yes."

Again, a recognition that the sale order itself approved the clarification letter.

"Q. Is that a provision that Milbank negotiated with Weil?
"A. Yes.
"Q. Tell me about Milbank's negotiations with Weil concerning that provision of the sale order."

He goes on to say, after the first sentence:

"It was anticipated that changes might be made. The debtors have represented that to the Court and the committee wanted to ensure that it had the ability to consent to any such changes."

Mr. Despins, on the next set of transcripts, one of the committee's lead lawyers, admitted at trial that he knew that the clarification letter modified the transaction and he did nothing.

"Q. And so, is it fair to say in September of 2008 you were aware that the clarification letter made certain changes to the transaction?
"A. That's a logical inference, yeah.
"Q. And you testified that you had asked the Court that no changes be made without your consent, correct?
"A. Correct.
"Q. And you had told Mr. Miller that he needed your consent,

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correct?
"A. Um-hmm.
"Q. You have to answer audibly.
"A. Yes. I'm sorry. Yes.
"Q. And you didn't give your consent, did you?
"A. No, we did not.
"Q. Now, in fact, you believe that the clarification letter did change the transaction presented to the Court, correct?
"A. I think that a fair reading of that letter is that it did modify the transaction, yes.
"Q. And under those circumstances, you believed your consent was required?
"A. Correct. That's correct.
"Q. And it was never given.
"A. That's correct."

There was no dispute about the existence of the clarification letter or the terms or that this Court had approved it. They had -- and this Court was extremely clear about this. You told them, "If you got a problem, come back to me. I'm here. I'll be here late. I'll be here. You can reach me. If you've got a problem, come back to me."

THE COURT: Let me clear about something, Mr. Boies. I never approved the clarification letter. You're making a circular argument about what the sale order says. But I never approved the clarification letter. I said that at the opening

and I'm saying it again at the closing.

MR. BOIES: Your Honor, I appreciate that and I would never --

THE COURT: It was filed -- it was filed in the docket of this case. There are now well over 12,000 docket entries. I do not know everything that is contained in every docket entry. No proceedings took place before this Court to approve the clarification letter per se.

MR. BOIES: Your Honor, I won't address that part of it anymore if the Court wishes me not to. But I think that --

THE COURT: I'm just letting you know that that's an aspect of your argument that I reject.

MR. BOIES: Okay. I understand that and I think I've got an obligation to at least pursue it a little bit further so that I have given this Court the benefit of my argument.

THE COURT: Absolutely.

MR. BOIES: And I do that out of the sense of fairness to this Court because I don't want to make an argument on appeal that I have not made to this Court. And that is that, with all due respect, Your Honor, I think that when the Court enters an order, that order belongs not to the Court alone but to all of the parties. Barclays took action in reliance on that sale order. Whatever the Court's subjective interpretation is, I respectfully suggest that what the Court has to do is look at the written words, the black and white,

and interpret that as though it was not your order because I believe if you do not, then the kind of reliance the parties, such as Barclays, must have in order to make enormous commitments can't really be made. I respect what the Court says and I won't go into this in detail. But I felt I did need to say to the Court that I believe that the standard that the Court needs to apply is a question of law and not a subjective interpretation.

Even if --

THE COURT: I totally agree. We're on the same page.

MR. BOIES: Okay.

THE COURT: The problem is that you're making an argument about Court approval of the clarification letter and a very critical feature of the current dispute. And it is absolutely clear, based upon the evidence, that the parties who prepared the clarification letter during the weekend immediately following the sale hearing were aware that one of the options available to them was to come back to court and to express approval of that document which everyone recognizes effected so many substantial changes in the transaction. In lieu of doing that, the parties, including Barclays, determined that no such approval was required and instead, the letter was lodged in the docket. Thereafter, it was referenced in various pleadings. But at not time did anyone ever seek formal approval of that document. That's the only point I'm making.

You're certainly free to make whatever arguments you wish to make as to the fair interpretation of the order.

MR. BOIES: And that is really all I'm doing, Your Honor, which is all I can do and all Mr. Miller could do, and you heard his testimony, is look at the Court's order and look at what the Court said in open court. Look at the portion of the sale order that expressly recognizes that it's going to be in that clarification order. It's part of the purchase agreement. It is expressly approved in that sale order. And the sale order recognizes that it is going to be changed.

Now one thing I think we can agree on, Your Honor, is that this clarification letter was fully known by each of the movants in September. Whatever any of the people in this courtroom did or did not do with this Court, they fully knew that. And for all of the reasons that we have cited, all of the law that we have cited, in this circuit and from other circuits, in terms of an inability of a party to know something or even have the reasonable ability to know something and to sit on it while that order is appealed and indeed while they support the affirmance of that order in the district court and then come back into this court and try to attack that order based on changes that they allege that are clear from the face of the clarification letter is something that the law does not countenance. And I would respectfully urge this Court not to countenance. And that has nothing to do with whether this

Court approved it or not. We can be in agreement that the Court didn't approve it. And that still would not have affected their responsibility to act in a timely way before this order was approved and before they support it on appeal the affirmance of that order.

And to give you a sense, Your Honor, and I note these not so much on my first point but on my second point. On September 29th, 2008, the debtor, LBI, not Barclays, the debtor, filed a motion with Barclays to file the schedules to the clarification letter under seal leaving entirely aside the question of this Court's involvement. This certainly further evidences not only that they signed it, that they knew about it, but they knew that it was being implemented. They were filing the schedules under the seal. We're giving them a copy. But were filing them under seal and that required a motion. And that was at slide 76.

Let me turn to slide 77. On October 2nd, 2008, the trustee successfully opposed a TRO by arguing that the clarification letter provided for all repo collateral to be transferred to Barclays. The Court may recall that on September 26th, 2008, the party filed a complaint emergency motion seeking to compel the trustee to transfer certain securities. On October 2nd, 2008, the trustee opposed that arguing that the case was "a nonstarter" because the securities were transferred to Barclays Capital -- and this is a quote

from the trustee -- "in connection with the sale of assets that was the subject of the Court's order dated September 20, 2008." The trustee's representatives explained: "Paragraph 13 of the clarifying letter states that the securities held by Barclays under the Barclays repurchase agreement as defined are deemed to constitute purchased assets."

So not only are they evidencing knowledge of the clarification letter, they're relying on it in the arguments they're making to this Court and they are, of course, acknowledging that it deals with the so-called repo. Another issue that movants were arguing that the Court had not known about.

Let me turn to slide 79. In December 2008, the movants again invoke the clarification letter in court this time seeking approval for the so-called December settlement. For example, the trustee motion for approval, paragraph 16, says "The clarification letter provided that the replacement transaction was terminated and for securities that have actually been delivered they're deemed to constitute part of the purchased assets under the purchase agreement."

Now, the Court also heard argument today that somehow the termination of the replacement transaction was something that raised a problem that the Court wasn't told about. Again, leaving aside the question of how much this Court believes that these kind of documents are disclosure to the Court, they

clearly reflect that the movants here knew and relied on. And for them to say that this wasn't disclosed to the Court I think is wrong. But for them to say months after the fact, we're going to base a Rule 60 motion on matters that are plainly described and set forth on the face of the clarification letter that they signed, knew about and acted upon for months, I think does not begin to approach the kind of burden that they have for attacking an order that has been entered by this Court let alone an order that has been affirmed on appeal let alone an order that has been affirmed on appeal at their instance.

So I would say to the Court that when they tell this Court that the clarification letter was this amendment, this enormous change that it added all these additional assets, that it took out a reference to book value, that it took out the estimate or any estimate of the value of the assets, that it changed it in terms of the repo transaction, all of the things that they're complaining about to this Court, all the things that they say this Court didn't know, does not disclose to this Court -- all of those things they knew at the time because, as they now admit, that is plain from the face of the clarification letter. That is why they argue that this Court didn't approve it. But I suggest to this Court that whether or not this Court approved the clarification letter they can't sit back in the reeds, wait to see how things develop, see whether the markets recover or not, and then come in and say, we want a

do-over because the clarification wasn't adequately described to the Court when they knew about it all the time.

I guarantee you, Your Honor, that if the markets had crashed, if this transaction had been a failure, if Barclays had lost billions of dollars, they wouldn't be coming back in here and saying let's redo the transaction. Their argument is that if they see something that they think is not adequately disclosed to the Court they can put it in their pocket, wait until they see if this turns out to be a good deal or bad deal, use the clarification letter as if it were approved by the Court because they certainly treated it, Your Honor, as it being approved by the Court, even if you didn't approve it, they certainly acted as if you did, we acted as if you did, we both argued to you based on its terms. So all the parties here are acting as if you have approved it. All of us know about it. And yet they're saying they can put it in their pocket, they can see what happens and if it turns out that the enormous risk that Barclays takes and took turns out to be successful they can come in and take it out of their pocket and say this is a basis for undoing that sale order and taking another, they say today, thirteen billion dollars from Barclays. And I suggest there has never been a case that remotely supports that. I suggest to you there's nothing in the statute. And I suggest to you that no Court has ever even approached such an interpretation of Rule 60.

Now there's another premise that underlies movants' argument. And that is a wholesale attack on the integrity of Lehman's businesspeople apparently with the sole exception of Mr. McDade who I will come to. Even Mr. Seery, respected Sidley Austin partner, who has no incentive to come in to this court and say anything under oath that was not true, is accused of a great lack of candor. Now the reason the movants' wholesale attack on the integrity of former Lehman personnel, some of whom are now at Barclays and some of whom are not, like Mr. Seery, is that it is impossible to reconcile movants' claims here with the sworn testimony of those executives about what they were doing and what they knew at the time. And so what the movants do is they come in and they say we want you to sweep all that away because these people were,-- they implied today and said in their papers, were breaching their fiduciary duties.

Now I remind the Court, if I can go to slide 82, that they identified certain individuals who they said breached their fiduciary duty. Those did not include Mr. McDade. They did not include Mr. Schaffer, Mr. Berkenfeld, Mr. Shapiro. They did not include Jim Seery until they heard his testimony and didn't like it. They did not include Robert Azerad.

To go to the next chart, they did identify eight people who they said had committed breach of their fiduciary duty. And yet, there was not a single shred of evidence in

this trial to support that allegation. And they don't even really make it explicitly in their argument. They make it by innuendo. They talk about bonuses. They disregard the testimony by Mr. McDade who they admit is their one honest man, that that bonus approach was normal for the industry. And he didn't believe it affected anybody is the kind of bonuses they would have gotten if they stayed at Lehman or if they had gone someplace else. It was an attack by innuendo, not by evidence. And yet, based on that innuendo and without evidence, they asked this Court to wholesale ignore the testimony of the Lehman people. And the reason that's so important, Your Honor, is because it is only that way that they can make any of the arguments that they make to this Court.

It was not just Mr. McDade and others from Lehman who testified that they did not believe anybody had committed any breach of fiduciary duty. Mr. Miller testified to that at slide 86. I asked him questions about this at his deposition and he was asked questions -- this at his trial:

"Q. Did you believe that the information that you were receiving from Lehman was information that you could rely on in making the representations to Court?

"A. I assumed that the people at Lehman were operating in good faith and I had no reason to doubt them."

And this is at the trial, Your Honor. This is after everything has come out, all the stuff about the bonuses, all

the stuff about what people knew. Question to Mr. Miller:

"Q. Have you ever had any reason to doubt it, based on anything that you have come across since September of 2008?

"A. No."

And then later on:

"Q. And have you found anything since then, since the sale hearing, that has led you to believe that the information that you were given was inaccurate or that the people at Lehman were not operating in good faith?

"A. No."

As of this trial, Your Honor, after all the things that the movants have shown him and given him.

At slide 87, Lehman's financial advisor, Barry Ridings, testified to the same thing.

"Q. Do you have any reason to believe that those at Lehman who were dealing with Barclays that week were not acting in good faith?

"A. I have no reason to believe that to be the case.

"Q. Let me include in that question Mr. McDade, Mr. Tonucci, Mr. Kirk and Mr. Lowitt. Do you have any reason to believe any of them did not act in good faith in their dealings with Barclays leading up to September 19th?

"A. I think they all acted in good faith."

You remember the chairman of LBHI, Mr. Ainslie, testifying at trial. We asked him:

"Q. As you sit here now, based on everything you know, is there any Lehman employee who you believe breached their duty during the Barclays sale process?
"A. No."

And this is consistent with all the testimony that this Court heard about how this was an arm's length, highly negotiated transaction. You had people on either side trying, in very difficult times, to arrive at a solution that both sides thought was fair. They were trying to negotiate. They were doing the best they could and they struck a deal and that deal was a deal that was then disclosed to the Court. It was not a deal that anybody could come in and give you precise numbers on. There is assertions that this was a deal that was imbalanced and sometimes it says, people say, in rough bounds or approximate bounds and I want to come to what those words means.

That this was, as this Court I think notes, a time where everybody has said the assets were extremely volatile, the markets were shut, there was a liquidity crisis the likes of which we haven't seen since the depression and nobody knew what these assets were really worth.

And what the Court heard today was a number of selected quotations from documents that use various numbers. What the Court has also seen at trial, and what I'm going to go through, are some documents that use very different numbers.

But when it's all said in done, what the Court is going to have in front of it are a whole series of different and inconsistent estimates. Estimates that varied from person to person, even at the same time. Estimates by the same person that changed substantially over time, just in those few days of that one week because of the turmoil in the market, because of the uncertainty. Because o the uncertainty even as to what assets Lehman had at that point. And that uncertainty led people, both during the process and immediately after the process, to have widely varying estimates.

Now what the movants want to do is they want to take all of the high estimates and say well this is what it was really worth and the Court wasn't told that. And we probably are guilty, to some extent, of taking all of the low estimates and coming to the Court and say, see how reasonable the deal was.

The fact of the matter is that all those conflicting estimates do is say to the Court that this was a period of great uncertainty and great difficult in coming up with exactly what the right number was. And determining what the right number was involved knowing what the assets were, which Lehman didn't, knowing what the value of those assets were, nobody did, particularly for the large number of assets that were liquid, and then deciding what the standard was, what the criteria was.

We even say this Court was told that the numbers that it was given were book value. Book value was mentioned in the first version on of the APA. It is nowhere in the clarification letter and it was nowhere in the sale hearing.

They say, well if it wasn't book value it was market value. The term market value is nowhere in the sale hearing except in one place where they're talking about the customer accounts. They knew how to use market value when they wanted to, they didn't use market value.

Now they didn't use liquidation value either. And as you know, probably a lot better than I do, and as Mr. Seery knows a lot better than I do, liquidation value is used in a lot of different ways. And he testified about how there was a bankruptcy meaning of liquidation value and then there's a way that traders and investment bankers use the term liquidating value, simply meaning the value that you can get if you sell it.

Now none of those terms were defined. None of those terms were presented in court. Anybody could have done that. Very possibly with more time and if this had not been something that had been going on for a few days but it had been going on like this case has been, literally for months, or even if it had been a case in which conditions permitted an exposition that went over several weeks or even a few weeks, there would have been greater precision and greater detail.

But as this Court knows, that's not the standard. I'm not a bankruptcy expert. Mr. Gaffey probably knows more about bankruptcy than I do.

THE COURT: I wouldn't go that far.

MR. BOIES: But I do know enough that under 363 and under the Bankruptcy Code what is at issue is does this make business sense for the debtor. And what I'm going to try to do today is to show you that even if this was not a Rule 60(b) motion with all the hurdles that I think exist, that even if this were not 2010 in October, it was twenty-five months ago in September of 2008, and this Court had available to it all of the information that has taken us months or years to find, collate, marshal and present it should still be the Court's decision that this was the right transaction, that it was fair to the estate, it was fair to the creditors, it was the best transaction available.

And one of movants' counsel suggested that among the argument is the finality of bankruptcy orders. It will come as no surprise that we do think that's a very important argument. But this is not our only argument, it's not even the argument that I really want to start with. Because I want to start and I want to address what I know is at the heart of this Court's concern, which is if you had known everything that you possibly could have known then, if everything that could possibly have been disclosed was disclosed, if you had had not a few hours or

a few days but weeks or even months to look at this, would you have done the same thing. And I want to address that issue and I want to address that issue with respect to each of the claims that they raise.

And I want to begin by addressing it with respect to a claim that counsel said he wasn't going to address but then did, which was the line in the original APA that talked about the seventy billion dollars of wrong book value. And he suggested that that number had somehow been manipulated.

Now, as introductory to that I want to emphasize some of the evidence that exists about how this deal was never intended, could never have been but was certainly never intended to be what has sometimes been referred to in this trial as awash. And let me begin by going to chart 13, which is Mr. Miller's testimony.

"Q. Did you ever represent to the Court that this deal was going to be 'a wash'?

"A. I did not.

"Q. Did you say in words or in substance to the Court on the 17th or the 19th that assets and liabilities 'in balance'?

"A. Since I didn't view the deal as that kind of transaction I'm sure I never said that."

Now the Court is aware, as we indicate on slide 11, that the APA included no representation or warranty regarding the value of the purchased assets and assumed liabilities. No

requirement of any definite relationship between purchase assets and assumed liabilities. No requirement, obviously, no provision of any kind regarding the ultimate impact on the Barclays or Lehman balance sheet. No requirement for any appraisal of final valuation of financial inventory or any other purchased asset other than for real estate. And never contained a true-up that would require a final valuation or accounting for all the financial inventory. All the kinds of things that would ordinarily be required, ordinarily be written if you were going to have a transaction that was in balance or awash.

Now significantly, although there was never a complete true-up drafted, as we indicate on slide 12, there was a provision that the Court was told about at the hearing for some limited upside sharing. And as this Court was told at the hearing "There was an upside sharing in the original transaction. There was going to be a true-up twelve months later on and that has been eliminated from this transaction."

Well, not only was the Court not told that there was going to be awash or that everything was going to be in balance, the Court at the hearing was told that there had been a true-up provision but that true-up provision had been eliminated.

Now, Mr. McDade testified in a portion of his testimony that movants' counsel directed your attention to,

that he thought there was going to be a rough balance between certain assets and certain liabilities.

Now, I hope the Court remembers that on my cross examination he testified what he meant by that and I'm going to come to that. But significantly for my present purpose, he was asked whether, and this is at slide 14, he'd ever had any conversations with anyone from Barclays about the deal being awash or any requirement that assets and liabilities match or balance and he said "No, I did not".

A theme that I said in my opening that I would return to is the theme that under the law subjective, unexpressed intent is irrelevant to interpreting a contract. Almost everything this Court heard this morning was subject, unexpressed intent.

The Court will recall that when their witnesses came to the stand and they testified about what they thought things meant, I or one of my colleagues would ask them, did you ever tell anybody from Barclays that? And the answer was no. Did you ever communicate that, in any way, to anybody at Barclays? The answer was no.

I respectfully suggest to the Court that the clear legal standard is first if the plain language is unambiguous you must stop there. But if you find an ambiguity, you must then look only at extrinsic evidence of what the parties exchanged. It's an objective test, not a subjective test.

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Subjective, unexpressed intent is irrelevant and I may even have a slide on that and somebody will help me find, in my book, where that is.

It is in, and I apologize for this Your Honor, it's the in second book.

THE COURT: Which you have to hand up.

MR. BOIES: Did we not hand up the second. Oh, I apologize, we haven't handed up our second book.

THE COURT: Is this a good time to hand it up?

MR. BOIES: It would be, Your Honor.

(Pause)

THE COURT: Is your live notes working?

MR. BOIES: None of our live notes are working. Mr. Gaffey and I have been suffering in silence.

THE COURT: Well, I'm glad it wasn't just me.

MR. BOIES: No.

This is in the book that's headed disputed assets and it's slide 304. And it's a series of citations to materials that repeat, probably more than is necessary, a whole series of Second Circuit cases that make clear that the subject intent of the parties of the irrelevant. That only objective manifestations of intent are relevant for interpreting the contract.

And while we're on the subject of law, if you turn to slide 301, we cite the Allegiance Telecom case and the Metro

Life Insurance cases for the, probably, black letter of opposition that a Court should not look beyond the confines of the contract to extrinsic evidence that's relevant provisions are plain and unambiguous. And then from Metro Life, "Language whose meaning is otherwise plain and not ambiguous merely because the parties urge different interpretations in litigation." Those interpretations are for the Court as a matter of law. If you find ambiguity then we go to extrinsic evidence. If we go to only objectively manifested extrinsic evidence that has been communicated. Subjective or unexpressed evidence is irrelevant.

I said I would also talk about what the so-called wash concept meant. And counsel directed your attention to the Lehman board minutes for the meeting that they approved the sale. And it talked about the concept of a wash, if you recall that.

I think what's important, if you turn to, and I'm now back in my big book and I apologize Your Honor, this is slide 15, maybe we can put it up on the screen, when you go to the draft minutes, remember the meeting approving this had been in the middle of September, still at the end of October 2008 the draft Lehman Board minutes, after several drafts, show that the wash concept that they were talking about involved assets of seventy billion and liabilities of sixty-four billion, a six billion dollar difference.

Now, it is true that that's plus or minus ten percent. And if you take Mr. Bart McDade's testimony about rough balance or rough equivalents a variation of ten percent might fall within that definition. And obviously the Lehman board believed that they could properly characterize this as a wash even with a six billion dollar differential.

So I think that the thing that you maybe take away from this is that even if you thought that this was a wash, and I would urge you that that was never said to the Court and never represented to the Court and the record is quite clear on that, but even if you're talking about what's in people's subjective minds, which I also say ought not to be relevant.

You've got to take into account the size of the transaction. And a buffer, in counsel's words and in the words of some of the documents in this case, of four billion dollars sounds like. It is a relatively small percentage of the total transaction that is involved. And I note that the size of the transaction went down from seventy to forty-five or forty-six and a half, I think the cash payment from Barclays was. And a four billion dollar buffer is still in approximately the same somewhat less than ten percent range as the number that the Lehman board was talking about.

So I think that you have to take into account, when you are thinking about these concepts, if you're going to think about the subjective intent at all, what is being meant by

that.

I think you also have to take into account that everybody understood, if you think subjective intent is relevant, everybody understood that without warranties and a post-closing reconciliation and true up provisions there could not be a wash, there could not be a transaction in balance or roughly in balance. For example, if you go to our slide 17 Lehman Board member Michael Ainslie testified at trial and I asked him during his deposition whether the could figure any way to accomplish and equivalence of assets to liabilities or a wash without the use of a true-up provision. Answer, "No I can't." And then I asked him "Do you believe today, given everything that you know, that it was a mistake on Lehman's part not to have a true-up clause of the kind you describe?" Answer, "In my opinion, yes. That kind of mistake, a negotiating mistake if it was one, and I don't really suggest that it was, but even if you credit this testimony that it was a negotiating mistake not to have a true-up provision, that is not a grounds for reopening the sale order, particularly since this Court, in open court with all the movants' representatives present, was told that there had been a true-up provision and that true-up provision had been removed.

So if anybody wanted to say to this Court, no we need a true-up provision because we want a wash, we want a transaction that's roughly in balance, they could have said to

the Court no don't approve this without a true-up provision, but nobody did because nobody thought, Your Honor, that that's what was going on and nobody could have thought that given the volatility of the markets.

Lehman's CEO, Bryan Marsal, who testified here, I asked him:

"Q. Given the uncertainty that existed with respect to the valuation of these assets, the fact that the valuations were changing, am I correct that it really would not have been possible to have a transaction with actual wash unless you have some kind of true-up provision?

"A. Yes."

And everybody recognized, I would suggest to the Court, that at the time. Everybody recognized that you couldn't have a wash or a transaction that was even roughly in balance without a true-up provision. Everybody knew the true-up provision had been taken out. Nobody objected to that because nobody thought that that was the nature of the transaction that was being done.

It's also, I think, important because of the emphasis that movants' counsel place on market value and book value, terms that were not used at the September 19th sale hearing except for market value with respect to certain customer accounts and do not appear anywhere in the clarification letter.

But given that argument I think it's useful to look at Lehman board's approval, which counsel for the movants also gave to the Court this morning and that's slide 20. And again, at trial I asked Lehman's representative and board member Michael Ainslie:

"Q. Now when you expected and liabilities to be in the words of the Lehman minutes, basically equivalent, was that based on liquidation value?

"A. Again, management was to put the deal together. We approved the outlines of the deal, the framework of the deal, and the way in which they value the assets was to be implemented by management.

"Q. Did you, as a director, have any understanding, one way or the other, as to whether Lehman's assets, for purposes of the Barclays transaction, were being valued on a liquidation value basis?

"A. No.

"Q. Now did you or the board give any consideration as to whether management should be instructed to try to use fair market value as opposed to liquidation value or vice versa?

"A. No, we did not.

Now there's no dispute, obviously, that all the numbers given to the Court were far above liquidation value. I'm not suggesting the liquidation value was the value that people picked. What I'm saying is that this was not a

transaction in which there is any evidence that anybody believed, or that anybody represented to the Court or represented to each other, that this was a deal that was going to be based on a rough equivalence of market value to market value or book value to book value.

Let me cover, very quickly, this question about the seventy billion dollars in the APA, because counsel keeps coming back to it and even though, obviously, that didn't end up in the final transaction, I don't want the Court to think that there was some game being played at that time. And in that connection I'd ask the Court to look at tab 22, begin at tab 22. And there's something of a bake and switch going on here in the sense that the APA's definition of purchase assets includes seventy billion dollars, approximately, of what are referred to as long positions. Separate from that is fifty percent of the residential real estate mortgage securities. The first in subparagraph D, the second in subparagraph E as the Court can see.

The evidence shows that the collateralized short term agreements, the residential real estate mortgage securities being transferred to Barclays were received from Lehman loans were worth approximate ten billion dollars and had not been subject to any write downs.

You've got to -- when you look at the charts that they give you, you've got to look at where they got these

residential mortgages. Because if they've got the residential mortgages in a column that adds up with the long positions you'd get to seventy-five million dollars -- seventy-five billion dollars and that is one of the confusions, I think, in some of the papers.

But if you just look at what's being added up and you take out the residential mortgage securities or the mortgage securities, what you do is you get back down to seventy billion dollars.

Now in addition, if you look at our tab 23, and this was one of our expert's demonstrative exhibits, if you look at the GFS data, which witnesses repeatedly said you've got to look at this if you're going to know what the Lehman marks are, you see for each day from December 12th to the 19th it shows the long positions, that is what's covered in subparagraph D of less than seventy billion dollars.

And if you go to tab 24 what you see is a calculation that takes it down by GAAP asset type for the balance sheet of Lehman Brothers as of September 12th, 2008, to sixty-five billion dollars. And then if look at slide 25 you see what I'm talking about in terms of how you add up the various securities that are here. And if you take them apples to apples, it comes up to be actually less than the seventy billion dollars that was estimated there.

As I say, I don't think that that's directly relevant

to what is before the Court, but I think it's important that the Court understand that that seventy billion dollars was a good faith estimate at the time of the long positions, not of long positions plus the residential mortgages, which were separately stated in the APA.

Now we've got a lot of exhibits in here on that issue but I'm going to skip those because I think there are more important things to focus on.

Let me focus on what is at issue here in terms of valuation, which is the so-called repo collateral. Now first, movants again told the Court that the Court was not told at the sale hearing that there had been a repo. That's not accurate.

Can we put on page 63; I've memorized the page it's on. At page 63, this is, I guess maybe this actually is a slide that we have, it's got a number 270, but this is a quote from Mr. Miller's presentation to you on September 19th and he says, "Barclays, Your Honor, has extended the sale to enable this extraordinary transaction and hopefully to be consummated."

Yesterday, as Your Honor has heard, Barclays basically stepped into the shoes of the Federal Reserve in connection with a primary dealer credit facility, that's the repo, as to the 45.5 billion dollars Lehman borrowed last money and received the collateral that Lehman had posted in connection therewith.

So there's no doubt that that's being referenced to the Court. There's no doubt that the Court's being told that what's now happening is Barclays has paid out 45.5 billion dollars and, as it says here, Mr. Miller said to you received the collateral that Lehman had posted in connection therewith.

Now there was disagreement about what the value of that collateral was, what the value of the repo collateral was. And I want to go to Mr. McDade at this point because he's, sort of, the one honest man that the movants identify from Lehman. And so that you have some context for what Mr. McDade told the Court, I'm going to take you through a series of statements that Mr. McDade made, several of them deal directly with the point I'm now addressing. I think they're broader but I think the Court may find it useful to see some of Mr. McDade's testimony in context.

Let me begin -- we have helpfully cut off all of the references to page numbers -- what's the first page number? Nineteen, this is at page 19 of the trial transcript.

"Q. I'd like to direct your attention now to the circumstances of the week of September 15th, 2008. The markets at that point, during that week -- throughout that week were, I think you've described them, tumultuous and volatile, correct?

"A. That's correct.

"Q. And the market had changed dramatically from Friday to Saturday and then again from Saturday to Sunday, again from

Sunday to Monday and changed again from Monday at 9 a.m. to Monday at 11 a.m. and continued to change, correct?
"A. Yes, they did.
"Q. And the prices were changing dramatically, correct?
"A. That's correct.
"Q. Now at your deposition you said that all the markets had shut down, can you explain what you mean by that?
"A. What I meant by markets shutting down, normal trading volumes had shrunk to small percentages of their norm in all asset classes, from liquid asset classes like government securities all the way through to the lesser liquid asset classes.

There was a tremendous amount of uncertainty and really a shrinkage of capital that was being used by market makers across the world.

And I think it is useful to keep in mind the context in which this was happening, not because it changes the standard that the Court applies. Not because it changes, in any way, people's obligation to be candid and fulsome in their descriptions to the Court but because it shows why this transaction was necessary and appropriate and why the kind of transaction that the movants now argue for simply could not and would not ever have been done under those circumstances.

Let me go to page 21:
"Q. And you recognize that Barclays, in the deal that was

ultimately done, was taking on a tremendous risk, correct?
"A. Yes they were.
"Q. And that had to do with the size of the transaction, the volatility of markets, the illiquidity of some of the assets and many other considerations, correct?
"A. Yes."

And again, I emphasize this because we agree with movants that Mr. McDade is somebody to be listened to and relied on by the Court.

Now let me turn to asset valuations, which was the point that I started with. This is at page 152.

"Q. Now did the valuation that was achieved with regard to the assets contain any delta between the book value at which Lehman carried those assets and the price that Barclays would pay?
"A. To the best of my understanding we would not mark the books since Friday evening close because we have so many operational challenges given the bankruptcy announcement on Sunday with just employees, loss of employees. So yes, my understanding is that marking process, the valuing process, that dialogue amongst the different risk groups would have delivered a different outcome than the marks on Friday given everything that happened to Lehman in the marketplace."

Now I want to jump to another subject within Mr. McDade and that's the so-called five billion dollar differential and this is at page 31.

"Q. Now this five billion dollar differential or approximate five billion dollar differential you would not describe as a discount, correct?
"A. I would not describe it as a discount, that's correct.
"Q. You would describe it as a change in the valuation of the assets, correct?
"A. That's correct."

And then, page 250, this is --

Q. Is it your understanding that Barclays had wanted to ascribe even lower value to these assets then is reflected on that Exhibit 19?
A. Very much so.

And I direct the Court's attention to that just to show that this was not a situation where Barclays was dictating the values. This was a situation in which you had two people, at arm's length, trying to arrive at what the values were. And movants' counsel make a big thing of whether Mr. Seery described this as negotiating or cutting a deal on valuation. But whether you call it cutting a deal or negotiating what you had was you had two parties at arm's length, very aggressively, trying to protect their rights and arriving at this ultimate conclusion.

I want to go back to 252, and this is in the context of the five billion dollar figure that I talked about earlier:
"Q. When you say 'we have marked our books appropriately,'

what are you referring to?

"A. You asked me about the five billion dollar figure, I think, in your question?

"Q. Right. Yes.

"A. I'm just saying that our responsibility was to mark our books to market each evening.

"Q. Right.

"A. On Friday September 12 we had done that. You then pointed out that the price on Exhibit 19 happens to be a five billion dollar difference. I'm suggesting that we went through a thorough process in terms of getting to the place on September 16 where this reflected the fair market value. So therefore I viewed it to be fair on Friday, fair and Tuesday and so that would reflect the five billion dollar change in terms of process."

He went on and talked a lot about this. I'm going to skip to page 187.

"Q. Did you have enough knowledge at the time to know the amount of money that Barclays advanced under the repurchase agreement?

"A. Approximately.

"Q. How much was it?

"A. Forty-five billion.

"Q. And did you have enough knowledge at the time to have an understanding of who much collateral Lehman gave to Barclays in

connection with the repo agreement?
"A. Approximately.
"Q. Who much was that?
"A. Fifty billion."

Now let me skip to page 224, line 7.

"Q. I want to know about the forty-five, putting aside the 15(c)(3), the unencumbered box, isn't it right that you're deal team and Barclays' deal team went through a process to value the assets that went to Barclays as part of the fed repo and concluded out of that process the value is forty-five billion dollars.
"A. To the best of my knowledge, yes.
"Q. Okay. And that is when you heard it, it was your understanding that that was the market value of that collateral, is that right?
"A. That's correct.
"Q. And your understanding of market value is the ability to transact securities of a normal lot size in the marketplace, is that right?
"A. That's right.

Now, the significance of this is not whether that is the right standard or not because this is, like much of the other evidence that the Court has heard, unexpressed subjective intent. And so I'm not saying that this controls.

I offer it, though, so that the Court understand what

Mr. McDade, whose integrity both sides have vouched for, had in his mind when you're thinking about what some of the people had in their minds. I think what any of these people had in their minds, if it wasn't written down, if it wasn't exchanged as part of the negotiating process, is irrelevant as a matter of law. But I'm conscious of the kind of attacks that are being made on my client and some of the people associated with it. And so what I want the Court to understand is what people of unquestioned integrity are saying about this very same subject.

I now want to turn to a different subject that Mr. McDade addressed and that was you'll recall that movants' counsel read you some testimony about how it wasn't usual to have book value determined by negotiations and let me read, for context, what Mr. McDade testified to at page 99.

"Q. Counsel also asked you whether it was unusual to have the value on a company's books be determined by negotiations with a single buyer, do you recall that?

"A. Yes, I do.

"Q. And you said it was unusual, correct?

"A. Yes.

"Q. Was this an unusual situation?

"A. Extraordinary.

"Q. Was it unusual to have a situation in which the only alternative to selling these assets was liquidation in bankruptcy?

"A. Very unusual.
"Q. And was it unusual to have only one buyer or potential buyer for these assets at that time?
"A. Yes."

Another subject that's relevant to this proceeding or at least the movants' counsel has raised that Mr. McDade addressed. This is at page 37.

"Q. Now you were aware that there were a number of other Lehman personnel that were involved in this process that did not have either employment discussions or employment agreements with -- or potential employment agreements with Barclays, correct?
"A. Yes, I was."

I'm not sure I read that question correctly, let me reread it just to be sure.

"Q. Now you were aware that there were a number of other Lehman personnel that were involved in this process that did have either employment discussions or employment agreements with -- or potential employment agreements with Barclays, correct?
"A. Yes, I was.
"Q. Did you believe that that somehow compromised their ability to represent Lehman in these circumstances?
"A. No, I did not."

I'm turning Mr. McDade into my primary witness just

because of the nice things that counsel said about him this morning. And so I'm actually going to read some portion where he's talking about something I'm going to get to later this afternoon, and that is the cure payments.

THE COURT: You're again using Mr. McDade for that purpose?

MR. BOIES: I am. And this is Mr. McDade's testimony again at page 52, line 17, carrying over to the next page.

"Q. Did you recognize that whatever estimate Mr. Kelly came up with represented a ceiling or maximum exposure?

"A. It was described as a potential exposure.

"Q. A potential exposure. And you recognize that that exposure might or might not actually result in payments by Barclays, correct?

"A. Yes. Yes, I did.

"Q. And you understood that Barclays had sixty days under the agreement to determine which contracts to assume, correct?

"A. Yes, I did.

"Q. And which contract Barclays assumed would determine what its cure payments were, correct?

"A. That's correct.

"Q. And the process of determining what contract Barclays was going to assume was not going to start until after the closing, correct?

"A. That's correct.

"Q. And the process of determining what contract Barclays was going to assume was not going to start until after the closing, correct?
"A. It couldn't start until after the closing given all the significant integration issues that had to take place.
"Q. And you understood that Barclays had complete discretion as to what contracts to accept and what contracts to object to?
A". Yes."

Counsel for the movants referred to some testimony about Mr. McDade not expecting a first day gain, the Court will remember that from this morning. And I want to show you some testimony that movants' counsel did not show you at that time, from Mr. McDade, first at page 96, line 17.

"Q. What is an embedded first day gain as you understand that term?
"A. My understanding, it's an accounting gain for assets minus liabilities, balance sheet assets and liabilities.
"Q. And was there anything inconsistent with your understanding of the transaction or the description of the transaction to the Court, whether being an accounting gain for Barclays on the first day?
"A. No."

I want to emphasize that in light of the portion that movants' counsel had directed your attention.

"Q. And was there anything inconsistent with your

understanding of the transaction or the description of the transaction of the Court, with there being an accounting gain for Barclays on the first day?

"A. No."

And then let me ask to go to the next page, line 3.

"Q. And when you answered counsel's question about a gain and you said, 'as described in the total valuation', I want to follow up on that.

"Am I correct that what you were referring to is that to the extent that the deal ended up being in the rough balance, it was rough balance with respect to assets and liabilities that had actually been valued in the process?

"A. Assets and liabilities valued and assumed payments for cure and comp.

"Q. Yes. And it did not include assets that were not valued, like intangibles, perhaps furniture and furnishings, whatever the assets were that were not valued, that was not included in what you called the rough balance, correct?

"A. That was not included with a view that those assets, to a non-operating going concern, Lehman, would have been of little value.

"Q. All right. And I just want to emphasize that. When you talk about assets and liabilities being or ending up being in rough balance you are talking about the assets and liabilities valued from Lehman's perspective not from Barclays'

perspective, correct?
"A. That's correct. I have no ability to understand how Barclays would value that.
"Q. And there were a number of assets that might have little or no value to Lehman as an operating company that might have substantial value to Barclays as an operating company, correct?
"A. Yes, I would agree.
"Q. And if that difference resulted in a first day gain for Barclays that was in no way inconsistent with the understanding of the deal, correct?
"A. Correct.

And I submit to the Court that if you're thinking about subjective interpretations, that is particularly important because what it says is that you have to look at how Barclays got the gain in order to evaluate how it fits in even with Mr. McDade's view of the transaction.

And I want to close with just one more quote from Mr. McDade. This comes from page 242.

Q. At the time that the transaction was presented to the Court, based on everything you know now at time of trial, do you believe the transaction was presented to the Court in a fair and balanced way?
A. Yes, I do.

And you'll recall the implication that somehow Mr. McDade was kept in the dark along with the lawyers. Somehow he

didn't, maybe, understand everything. Well, after he has understood everything, after he has been shown everything, after he's been asked all the questions, he's asked based on everything you know now, do you still believe the transaction was presented to the Court in a fair and balanced way and he says yes, I do.

There are a couple other things that I just want to emphasize for the Court. I think the Court probably has it in mind from all the testimony that we went through but I just want to emphasize it.

First, as we indicated on slide 35, the 47.4 billion dollar number was not a valuation cap, it was provided for guidance as to what had become of the long positions. And over half of the assets in the repo or collateral by value were illiquid assets, very difficult to value. The fact that there are different valuations of this, some below and some above, that 47.4 figure ought not to be surprising.

On September -- this is on slide 36 -- on September 19 Lehman had concluded independently that the repo or collateral likely had a market value far below Lehman's last marks.

The Court will remember some of these e-mails, for example the Alex Kirk e-mail to James Seery at 5:55 p.m. on September 19th, "I believe the value is 45.5. I don't know the marked value." You'll remember Mr. Kirk's testimony that generally the response was the markets are too volatile,

there's too many line items, it's not possible to get this done in any pinpoint fashion in this timeframe. And that the Lehman traders concluded "Many of these positions were so illiquid that if we were to try to sell them, given our circumstances the bids might be down twenty percent."

We can skip our slide 37 because that simply repeats some of Mr. McDade's testimony that I've already read and I don't think we need to do that again. It is useful, I think, to look at slide 38 in light of movants' assertion that Mr. Yang's fed facility haircut analysis was particularly relevant. This, as I think the evidence is absolutely clear, applied to a different portfolio then that which was delivered to Barclays. This applied to something with a realizable value of 44.6 not a "fire sale" value of 45.5. And I think the record is clear that this was a different analysis of a different portfolio then what was involved.

At slide 39 you also have the unrebutted testimony of Stephen King, the Barclays trader, who testified that in making the assessment they tried to be as objective as possible. It was not a fire sale, it was based on as orderly a runoff as one can contemplate in the months following the bankruptcy.

As indicated on slide 40, Mr. Seery repeatedly testified that the fed facility haircut analysis was not, as movants claim, a fire sale liquidation valuation. There simply is not contemporary evidence of that. Everybody involved in

the process, not just Mr. Seery and the others, have testified to the contrary. And the reason that its necessary for movants to mount this wholesale attack on the integrity of Mr. Seery and all of the other people who've testified, not just one or two but a wholesale attack, is because they all have a consistent set of testimony that is contrary to what they need to establish in order to have a prayer of establishing their 60(b) motion.

Now, let me turn to the subject that movants' counsel described, I think, quite aptly as what did they know and when did they know it, because this is, obviously important for their Rule 60 motion.

And let me just skip into tab 80 as a starting point, which is where I -- which is something that I'd already talked about in terms of knowledge of the clarification letter. That on February 9, 2009 the trustee specifically acknowledged that the clarification letter was in full force and effect. And as I've said, that by itself makes it impossible for them to maintain this motion. Because whatever else they knew, they knew then that there was no -- there was an absolute, to put it in an affirmative way, they absolutely knew that there was nothing in the final clarification letter that provided for estimate of values. They absolutely knew there was nothing in the final clarification letter that provided for a true-up. They absolutely knew there was nothing in the clarification

letter that provided for a wash or things being in balance. And they absolutely knew, from other sources, that there were documents from which they could make the same arguments that they are making now.

The thing that I think is remarkable about this presentation by movants is that most of the critical points are drawn from materials that they had at the time. For example, they talk about the first day gain and they talk about the question of the mismatch between assets and liabilities. They knew all about that in September of 2008. They knew everything they needed to know to bring this motion at that time. They certainly knew everything they needed to know to seek discovery at that time.

Now we have not had, as the Court knows, an opportunity to take discovery of the LBHI and the trustee's professionals. The Court did grant us that right, to take discovery of the professionals for the committee. That discovery has demonstrated that they knew back in September of 2008 the same arguments, they had the same arguments that they're making today. And we also know, just from the committee professionals' discovery, that all that was known by the trustee and LBHI as well.

Now we believe that if we had discovery and if the Court had the benefit of the documents from this period -- from the professionals from LBHI and the trustee, they would show

exactly what the discovery from the committee's professionals have shown and indeed showed even more so because they had greater knowledge and greater involvement than the committee. But I'm going to be referring, primarily, to the materials that we have from the committee because that's the only professionals that we've had discovery from.

I want to begin with something that the movants alluded to, which is a September 17th, 2008 Barclays press announcement followed by an analyst report

Now, movants would have you believe that this was somehow a secret conspiracy on the part of a large number of people at Barclays and at Lehman. Not only to conceal an understatement of assets and overstatement of liabilities from the committee and trustee and LBHI but from their own lawyers. And if you credit what you've been told this morning about Mr. McDade, from their own president and lead negotiator.

Now this supposed secret conspiracy was something that Barclays announced in the press and had a press conference and an analyst's report about. Now, I'm not suggesting that this is disclosure to the Court. Disclosure to the Court is what the Court gets. And while I may disagree with the Court about the clarification letter, I am not suggesting that these press announcements are disclosures to the Court. That's why I bring them up in the part of my argument about the standards for 60(b), because they are most certainly something that

demonstrates what the movants knew and should have known at the time. And that's critical because they can't sit on their rights, turn a blind eye to what's publicly available and then try to come in and say, months or years after the fact, we're moving to undo this court order.

And slide 128 shows the very mismatch of assets and liabilities about which the movants complain. Not only was this not a secret conspiracy but it was something that Barclays put out for immediate release.

Going to the next slide, in addition to having a press announcement Barclays put out another announcement in anticipation of an investor teleconference. What did they say? They said, "We are acquiring trading assets with a current estimated value of seventy-two billion dollars and trading liabilities with a current estimated value of sixty-eight billion dollars for a cash consideration of 250 million dollars."

And in the analyst's call they talked about a four billion dollar buffer, and this is at slide 130, which they said they absolutely expected to preserve. That was their announcement. That was their intention.

Now, I will show you that not only should they have known about this but they actually did know about it. I will show actual knowledge as well in a moment. But as might be expected, the financial press, this goes to slide 131, widely

reported that Barclays was acquiring a business with this asset liability mismatch, Exhibits 796, 111, 797, 798, 115, The New York Times, The Wall Street Journal, USA Today, The Financial Times. You'd have to have been hiding in Bin Laden's cave not to understand what was going on here.

Two days before the sale was approved Barclays publicly announced its expectation. Remember it had already talked about the asset liability mismatch, now it's publicly announcing its expectation that it would record a post-tax accounting gain of approximately two billion dollars on the acquisition. Not a wash. Not a transaction that's roughly in balance but a transaction with a post-tax accounting gain on acquisition of approximately two billion dollars and that's at slide 132.

And it's repeated again later in that announcement, that's at 133. And if you go to 134 you see that the fact that Barclays publicly announced its expectation, that it would record a post-tax gain of two billion dollars was shared with Mr. McDade and other Lehman employees. No effort here to try to keep Mr. McDade in the dark. He was sent this announcement about the expected post-tax two billion dollar gain.

Now just like the financial press jumped all over the asset liability mismatch that Barclays expected to get, it jumped all over the substantial gain. Slide 135 refers to Barclays Exhibits 382 and 381, Reuters and The Financial Times

talking about how it's going to be two billion dollars after tax and almost four billion dollars pre-tax.

Now it wasn't just Mr. McDade and the Lehman people who got this. Before the sale hearing, and I'm now going to Barclays' Exhibit 198 and slide 136, before the sale hearing the committee itself got this. On Monday, September 17th the financial advisor to the creditors' committee was sent this report, that the transaction was going to result in a two billion dollar after tax gain for Barclays going to the creditors.

Now what does the creditors' committee say in response to that? If we go to the next slide, which represents Barclays' Exhibit 285 and it's slide 137, you see Mr. Gilbert, a member of the creditors' committee, responding to the notice that he had received about how Barclays was going to have this two billion dollar gain, after tax, from the transaction. What does he say, "We will make sure this information is considered in the Lehman proceeding."

And before the closing, if we go to the next slide, which is Barclays' Exhibit 261, you see Mr. Gilbert sending it around to all the committee members and advisors; Mr. O'Donnell, Mr. Despins, all of the other people. And he's sending around the transcript of a Barclays/Lehman agreement announcement. And he sends around that announcement which is publicly declaring that there's going to be a two billion

dollar, U.S. dollars, post-tax gain as a result of the acquisition.

THE COURT: Mr. Boies, I think we need an afternoon break.

MR. BOIES: Thank you, Your Honor. I appreciate that.

THE COURT: I think it's a crowded and warm courtroom and we've been at this for a long time. So rather than make this an endurance contest, I think we should take a ten minute break.

MR. BOIES: Thank you, Your Honor.

(Recess from 4:11 p.m. until 4:29 p.m.)

THE COURT: Please be seated.

During the break we tried to make it a little cooler in here, I'm not sure if we succeeded but I think we all needed the break given the heat.

MR. BOIES: What I was addressing before the break was the extent to which the movants were aware, in September of 2008 and shortly thereafter, of the arguments that they make today. And I was directing your attention to Barclays' Exhibit 219, which is at our slide 139. And this is an e-mail that went to the committee that included an attachment where Goldman Sachs, who was the financial advisor to the bondholders and who objected to the sale at the sale hearing to what they called a discount and a fire sale deal, said "The proposed sale involved a windfall discount to fair market value of at least several

billion dollars." That's what Goldman Sachs was saying on September 19th, 2008. That's what the committee was being told then.

And not only was the committee being told these things, but the committee's advisors admitted that they knew at the time that Barclays was going to have an economic gain on the transaction. If you look at slide 140, this is trial testimony from the committee's financial advisor, Mr. Burian.

"Q. If you look at the entire transaction, though, it was your understanding that Barclays was going to have an economic gain on the transaction, correct?

"A. Correct."

And they explain that, just as Mr. McDade had, is that there were a number of assets that would have little or no value to Lehman Brothers but substantial value to Barclays. There were liabilities that Barclays might be able to work off that Lehman couldn't and that those things, in combination, would be expected to give a gain to Barclays. And in addition to the testimony I just elicited, at the next slide, 141, I asked Mr. Burian when did he first tell the committee his opinion as to whether or not Barclays was going to have an economic gain from the transaction. And he said, the first couple of day, the week that they were first employed.

He says, "We probably said wow, Barclays is making out like bandits on the broker/dealer business." And he said it

was viewed by all of us as being "incredibly an inexpensively huge gain for that going concern engine."

And then I asked him:

"Q. Sir, that all times during your conversations with the committee, to the extent that you would be talking about whether or not Barclays was going to have an economic gain, you would have been telling the committee that in your opinion Barclays was going to have an economic gain, correct?

A. Yes.

Now the movants now come in and say we were first alerted to this when we saw they were going to have an economic gain. Remember the movants' counsel telling you that this morning? They said we were trying to figure out what was happening and then Mr. Gaffey says everybody on my side of the table got really excited when we saw an announcement that Barclays was going to have a gain.

Here is the committee people saying they knew it all along. You have Barclays publicly announcing it all along and you have the Lehman advisors saying that they knew it was going to be a gain for Barclays all the way along, unless of course it didn't work out. So that was a tremendous risk if it didn't work out but if the thing didn't clear there was going to be an automatic gain just because they were getting lots of assets that had value to Barclays that didn't have value to Lehman Brothers. They also were going to get -- they were taking on

liabilities that they could work off in various ways that Lehman Brothers couldn't.

Now it turned out that some of the ways they expected to work off those liabilities, like not putting them immediately on the balance sheet, didn't work out from an accounting standpoint but they didn't know that at the time. And so they were announcing this economic gain publicly, talking to analysts about it, newspapers were full of it, the committee representatives got that, the committee representatives made their own analysis of why they would have an economic gain. And they knew going in that this was the case. And so when the movants come to you and say we just discovered this when Barclays finally announced their final accounting, I suggest to the Court that that simply is not credible because they had known it all the way along.

Now you also heard a lot of evidence about where the actual acquisition gain came from. And you'll recall that Barclays' acquisition balance sheet showed a total post-tax gain of 4.1 billion dollars. If you go to chart 149 what you see is that that gain would not have been reported without the 1.98 billion dollars for intangibles, fixtures, fittings and software, assets that are valuable only in the operation of the business and not in liquidation. These were exactly the kind of assets that Mr. McDade said we don't care that Barclays has got a gain if they make their gain from these kinds of things

because these kinds of things don't have any value to us. And you'll notice that the 1.98 billion dollars is very close to the two billion dollar gain that was being predicted.

Now in addition there was a 2.4 billion dollars in net value for exchange traded derivatives, something that could not have been predicted at the time. It was not just Mr. McDade that got the information about the issues that the movants raise. Lazard, who was the debtors' independent financial advisor, received e-mail after e-mail, document after document that detailed exactly what was going on, exactly the kind of possibilities that existed and exactly the kind of documents and data that existed upon which movants rely right now.

For example, if you go to tab 150, this is an e-mail, September 15th, it goes to Barry Ridings among other people and it says that it's going to -- the purchase is going to be a fixed discount on the assets that remain to reflect the bulk size of the purchase.

Now in fact that didn't happen but the issue that the movants relied on was something that everybody knew about. If you go to the next one, which is 151 that reflects Barclays' Exhibit 196, again you're talking about the so-called buyer "discount" that Mr. McDade also talked about. Now Mr. McDade explained that really wasn't a discount, that was something that was related to a more appropriate valuation but the word discount, which is the word that movants seize on, was

something that was widely known and widely known by the movants themselves.

Barclays' Exhibit 237, which is displayed on slide 153, shows that Lehman's lawyers knew before the closing that the repo collateral was marked in excess of forty-nine billion dollars, five billion dollars more than the repo loan and more than the 47.4 billion dollar guidance of the so-called long assets that were remaining that was given to the Court.

And if you turn to the next slide, which is 154, this is Barclays' Exhibit 830, this shows that the committee got the same information. So here's the same information going to the committee. And if you turn to the next slide, 155, Barclays' Exhibit 739, here's the same information going to the committee's lawyers.

What they have come in, Your Honor, is they've said look, this collateral is really worth forty-nine, fifty billion dollars you got it for five billion dollars less. This is exactly the kind of allegation that could be made from these documents themselves. In fact, this is the same kind of document from which they do make the argument now. So this is not something that they didn't have access to before.

Now if you go to 157, you see the testimony from Mr. Seery explaining how he explained to Mr. Burian the transaction and how the forty-five billion dollars had come about, because there was a five billion dollar difference between the amount

they advanced and the marked amount of those securities. And he goes on to say that the transaction would close and Barclays would take the securities versus the forty-five billion dollars that they had advanced and that Barclays believed the five billion dollars wasn't fair because the securities were worth less than the marked value, something which turned out to be true.

It has been suggested to me that it might be more interesting to the Court if I mix this up with a little bit of video or audio, depending on whether it's from the trial or from the deposition.

THE COURT: It depends entirely on what you plan to play.

MR. BOIES: So we'll play this. I tend to take a more old fashioned approach but --

(Begin playing of videotape excerpt)

Q. -- to the committee about the transfer of repo assets and Barclays' concerns upon receiving them?

A. I believed I generally explained to Mr. Gary the substance of the transaction, the way that the long positions had changed, that Barclays had actually received different securities, that they had concerns about the value, that the face amount of the securities that we had marked was about fifty million and that they thought that it was worth a lot lower number. I explained that they had advanced forty-five

billion dollars against that and there was a five billion dollar difference between the amount they advanced and the marked amount of those securities. And that the transaction would close and that Barclays would take the securities versus the forty-five billion dollars they advance. And the five billion dollars they believe, Barclays believed, wasn't there because the securities were worth less than the marked value and that there was some legitimate dispute about that but we pushed back, I didn't concede, again, that they were worth less than fifty billion dollars but certainly told them that our own traders had taken a look at these values and there was a question.

Q. Do you recall whether Mr. Burian questioned you about this five billion dollar difference that you say you told him would go to Barclays if there were a gain?

A. We certainly discussed the five billion dollar difference and we certainly discussed the potential value of those securities and the risk. The risk was, to Barclays, if they weren't worth forty-five billion dollars that was Barclays' problem. If they were worth more than forty-five billion dollars there was no up side to the estate.

Q. Did you discuss with Mr. Burian and Mr. Fazio, again, whether Lehman and Barclays' assessment of the actual values was different than the market value of the collateral received by Barclays?

A. Yes. This was a basis of the discussions. That is Mr. Fazio and Mr. Burian continued the call that they had had on Friday were quoting the difference between the forty-five billion advanced and the fifty, roughly, face value of those assets. And their concern was that five billion dollar difference. But that was the basis of the conversation. If there had not been that difference there wouldn't be any reason to have a conversation.

Q. So you explained to them that if these securities were sold, they may be sold for more than the negotiated values the parties estimated?

A. The risk -- the risk was Barclays' and the benefit was Barclays'. If Barclays sold them for more, there was more upside in the portfolio it would go to Barclays. If Barclays sold them for less, they would suffer the consequences. Remember, this is before the markets recovered. The markets were in a downfall, significant downfall.

Q. Please tell Judge Peck, were you clear with them about this five billion negotiated value, the difference between what the collateral was in the repo and what the parties believed its value was in the market that day.

A. I was absolutely clear, and again if there wasn't a difference between the amount of money that Barclays advanced and what the committee believed the securities to be worth, we wouldn't have any discussions. Why would be having a debate

right after the big meeting and then subsequently several into the night to review these items if there was no disagreement on the value versus the amount advanced. We went through this a number of times and frankly that's what has maybe been discussed about this litigation, the idea that this is a great secret. It wasn't a secret; they knew exactly what this was.

(End playing of videotaped excerpt)

MR. BOIES: And that, of course, is exactly what we're saying, Your Honor. Is that they did know exactly what this was at the time and chose not to come to court, not to seek any relief and on the contrary, to continue to rely on this, support it and seek its afferents on appeal.

I also want to direct your attention to Mr. Seery's testimony at slide 158, because there was a suggestion by one of the movants' counsel that somehow Mr. Klein is the last word that they have. As the Court can see from pages 68 to 69 of the May 4th trial transcript, Mr. Seery testified that after Mr. Klein left, and Mr. Klein was just there very briefly, when he left the meeting Mr. Seery stayed and answered all their questions. If you recall, there was some complaint from the committee that Mr. Klein didn't answer all their questions, Mr. Miller wouldn't answer all their questions but Mr. Seery stayed and answered all their -- every question they put to me, he says. So the last information they had was exactly the information that you just heard Mr. Seery testify to.

Now if we go to slide 162 the Court will recall that on December 11th, 2009 LBHI's special counsel told this Court that LBHI "remained unaware of the five billion dollar discount which was not revealed until August of this year," meaning August of 2009.

Now what we've just shown you is document after document after document talking about the five billion dollar discount. And if you look at Barclays' Exhibit 437 you'll see LBHI administrator, Alvarez & Marsal, discussing with the committee whether they should "Get 5.5 billion dollars back". They didn't find out about this in August of 2009, they're talking about on October 1, 2008.

On October 8th of 2008 Alvarez & Marsal, and this is Barclays' Exhibit 131 at page 28, gave a presentation that stated that Barclays "Negotiated a five billion dollar reduction from Lehman stale marks".

Now on October 6, 2008 Alvarez & Marsal described the deal as involving "A negotiated mark haircut" of five billion dollars. That's Barclays' Exhibit 332.

It simply is not the case that LBHI found out about this on August of 2009. It's simply not the case that LBHI, as Your Honor was told, "Remained unaware of the five billion dollar discount which was not revealed until August of this year."

Now, if you look at slide 164 you will see notes of a

meeting at the end of September in which two of the alleged fiduciary breachers, Kirk and Tonucci described the deal in detail to Alvarez, including a five billion dollar difference in valuation.

And if you look at slide 165 you'll see, from October 6, 2008, where Alvarez & Marsal are documenting for the committee, that is you have LBHI sending the committee's financial advisor a description of how there was a five billion dollar haircut, a five billion dollar mark negotiated haircut from the repo assets. This is October 6, 2008.

Now as I've said, Barclays' Exhibit 131 talks about a negotiated five billion dollar reduction, and that's slide 166, and this was the October 8th, 2008 Alvarez & Marsal presentation. A presentation that included not only the committee and LBHI but the trustee as well and we asked, and this is at slide 167, we asked Mr. Kruse, who was there and who was the Alvarez & Marsal 30(b)(6) representative, on the topic of the alleged discount. So this is the person that the movant puts forward as the person with the most knowledge about this subject and asking him about that discount at his deposition. The question was:

"Q. And you recall there being a discount talked about in that motion, the Rule 60(b) motion?

"A. Yes."

And this is very significant, Your Honor.

Q. Is that the same discount that's referred to on page 28, the five billion dollar reduction?"

And that page 28, if you'd just turn back, is Barclays' Exhibit 131, page 28, where on October 8th Alvarez & Marsal is talking about a negotiated five billion dollar reduction. And he's asked:

"Q. Is that discount that you're relying on in your Rule 60 motion, the same as the five billion dollar reduction that you knew about in October 2008?

"A. I believe it applies to the same pool of securities.

"Q. Is it different in any way?

"A. Well, no."

Now I suggest to you is that it would have been clear even without that testimony that they knew about it, but with that testimony I respectfully suggest that there is simply no way that anyone could conclude that they were not aware of, in October of 2008, the first week in October of 2008, of exactly what they finally brought to this Court in 2009, late 2009, saying they only discovered it in August of 2009.

Now I mentioned before that we had gotten some discovery from the committee and initially they withheld these documents. But if we go to slide 168 you see a document, Barclays' Exhibit 813-A in which the committee's advisors are writing, "The night of the close of the transaction we were told Lehman while that the prices of -- that the pieces of

transaction that were being described to us added up to fifty-two to fifty-three billion dollars rather than the approximately forty-seven billion dollars that had been described in court the Friday before."

Later on, "A few hours after we raised the issue Lehman came and got us and sat down to try and show us how things added up. We were told that some of the marks shown on Schedule A were out of date and that the parties had agreed to a five billion dollar discount." Again, Your Honor, I would emphasize two things about that.

First, in their contemporaneous letter they're not talking about Barclays telling them anything. They're telling each other that it's coming from Lehman. The second thing is, whoever it's coming they know the night of the transaction that there was this difference and that there was this argument that the assets and liabilities have a mismatch.

If you go to 169, the 30(b)(6) representative of committee law firm Milbank Tweed questioned:

"Q. When is the first point in time that Milbank or Houlihan committed to Weil this concern about a five billion dollar mismatch?

"A. On Sunday, September 22nd. Sunday or Monday the 21st or 22nd."

So there simply is not an argument, Your Honor, I think, that they weren't aware of this.

Another document that we got, only because the Court overruled their work product objection, is Barclays' Exhibit 812 at slide 171, September 28th where they say, "The two sides somehow said that although the detailed Schedule A totals to X it's really only worth Y in the aggregate because the marks in the system are somehow outdated, which seems odd. The difference between X and Y is several billion dollars."

There are a number of other documents that are described in here; I won't go through all of them because I think the issue is pretty clear that this issue was wholly known by the movants in September or early October. We believe it was known before the close. But whether it was known before the close or not, it was clearly known in early October or late September. And Weil, if they'd come in at that point, I think there would have been a question even then but as a practical matter something could have been done at that point But the fact of the matter is they wouldn't come in then.

The reason they wouldn't come in then is because they knew that this was by far the best and only transaction. They only had an ability to sit back until it was too late to unscramble the transaction and then come in and ask this Court to rejigger the pieces, to change the contract, to rewrite the contract to make it more attractive for them.

So they put these issues in their pocket. They knew these issues couldn't help them. They put them in their pocket

and just waited and sat in the weeds to see if whether they could come forward later. And I suggest to the Court that whatever signal that the Court wants to give, it is not a good signal to say that that's permissible conduct. Because if they believed, as they say they now believe, that these documents created a problem, they had an obligation to come in and tell the Court about it at that time.

Even if, as I say, they had come in at that point, we would still have been arguing to the Court that this is an appropriate transaction to approve. And I want to turn, now, to sort of, each of the elements that if we were back twenty-five months ago we'd be talking about. That is if they had not sat on their rights, if they had not supported this order, sale order, on appeal, if it had not been affirmed, if we'd not gone through the integration process, if we were back twenty-five months ago and they came in and they said stop this transaction, we think it's a bad transaction, what would we have said? And that's what I want to -- that's what I want to address now. Because, as I said earlier, I know one of the things the Court is thinking about is regardless of whether anybody's at fault or not would I have approved this back then if I knew everything then that I know now? And I think the answer is clearly yes and let me go through the items one by one.

First, let me deal with the issues of comp and cure.

I've dealt with the issues of the valuation of the repo and I think we've shown how those valuations were uncertain, changing and the valuation that the estate got was substantially higher than anything that they would have been able to get from any other source. So from that standpoint I think the Court would still feel that this was an appropriate decision to make, to approve it. But let me deal with the issues of comp and cure as well.

Excuse me just one moment.

(Pause)

MR. BOIES: The Court will remember that Harvey Miller told you that there was an exposure for compensation liabilities that was estimated to be two billion dollars. And counsel for the movants referred to that and if you look at our slide 48 it sets forth what Mr. Miller told you on September 19th, 2008.

Now, there's no dispute that Barclays spent approximately two billion dollars on compensation. The dispute is whether this two billion dollars for compensation includes both bonus and severance payments. The issue is that Barclays spent about a billion and a half for bonus and about a half a billion dollars, in rough numbers, for severance. And what the movants say is that you knew you weren't going to spend two billion dollars for bonuses and to count severance in there is not appropriate because the two billion dollars that was given

to the Court was not for severance, it was only for bonus.

There is nothing in what was said to the Court at that sale hearing that supports that, Your Honor. Mr. Miller testified, going to our slide 49, that the compensation obligation "Was supposed to cover both, severance pay and bonuses". That's what he testified to at the trial.

Mr. Shapiro -- and Mr. Miller's testimony is at April 28th, page 32, lines 23 to 24. Mr. Shapiro testified on August 23rd that the term comp encompassed "A combination of the bonuses that they would pay and if and to the extent that they weren't paying someone a bonus because they were terminating that person's bonus, it would include severance for that person." That's at 120, lines 20 to 24.

Mr. McDade testified at trial, April 26th, page 61, lines 1 to 3, "Barclays also assumed a two billion dollar compensation liability with respect to the combination of the employees' bonus process and the severance process."

Exhibit 131, if you could go to page 28, I don't know if we can pull up page 28 or not, but this is the Alvarez & Marsal October presentation. And my recollection is that they talk about the liabilities assumed and they talk about an assumed cure liability and an assumed severance liability.

Now movants' argument here is there was no severance liability assumed, there was just -- it was just the bonus liability. Here they're encompassing the bonus with the

assumed severance. So everybody understood that the severance liability was part of this two billion dollars. And so I think if we were standing here twenty-five months ago saying is this a fair deal and we were telling you what's going to happen is Barclays is going to pay about two billion dollars for severance and bonus for these employees and that's something for you to take into account, I think you would be saying, yes, I think that's something to take into account. And compensation -- and Mr. Miller says, and Mr. Shapiro says, as our one honest man Bart McDade says includes severance as well as bonuses. And that's what Alvarez & Marsal thought too before this litigation started.

Now, there are some documents that talk about whether the compensation liability is going to be as high as it turned out to be. In part, because it was thought that some of it could be simply expensed as a matter of normal payroll, it would not have to be listed as a balance sheet obligation. It turns out that the accountant said no you have to list it as a balance sheet obligation.

So when you look at some of the documents there that had different estimates from this, remember you've got to figure out how much is going on the balance sheet and how much is going through the profit and loss statement, because you've got to add those two up because those are, together, the total compensation that's being assumed. And I think there's no

dispute now that if you include severance, along with bonus, it would be approximately the two billion dollars.

Now let me turn to the second liability issue that the Court was told about and that is cure, and that is at slide 53. And Harvey Miller told this Court, on April 19th, that Lehman had a cure estimate of 1.5 billion dollars, this is less than some of the charts that were shown you by movants' counsel because those charts were earlier in the week when the estimate was higher, 1.5 billion dollars. And he told you that that was a potential exposure. And the sale motion itself made clear that Barclays had "The right but not the obligation to take assignments of contracts and leases that are designated for assumption and assignment." And that's Barclays' Exhibit 11 (ph.) at paragraph 14, that this was all potential.

Now, if you go to slide 54 you see, among other things, Saul Burian's testimony "I understood that Barclays had the right to cherry pick those contracts necessary for the operation of the Business." So there was never any doubt that this exposure was a maximum and that the actual amount paid would be less and considerably less.

And if you go to page 56, slide 56, you will see that Mr. Shapiro and Mr. Berkenfeld and honest Bart McDade all testified that these cure estimates were done in good faith, tried to get the most accurate information possible in difficult times and remembering always that they were doing an

estimate of what was described as potential exposure.

There's also, if you go to slide 57, uncontradicted evidence that the cure estimate was provided by Lehman and Barclays was not involved in the calculation. Mr. Clarkson testified to that on April 30th at page 71, line 25 to 72 line 11.

He also testified that it took until about November to figure out what the actual cure amount was going to be, that's found at April 30th at page 71, line 25 to 72, line 11. And that various drafts of Barclays' acquisition balance sheet contain different numbers for cure because there was uncertainty over how much, if any, needed to be recorded as a liability. And again, you will see high estimates and you will see low estimates. But the uncontradicted testimony is that the amount of potential exposure given to the court came from Lehman without Barclays' participation.

Now there's a difference between the mission critical contracts and the remaining contracts. The mission critical contracts were the ones that had to be accepted and those obviously would have much lower cure payments than the total maximum for all of the contracts.

So when you look at some of the numbers some of them are just for the mission critical contracts and the 200 million dollar estimates. But no estimate that is contrary to the estimate given to this Court of the maximum exposure. And the

fact that Barclays, because it had an ongoing relationship with some of these people and also had alternative suppliers, would be able to negotiate with potential cure recipients and get that number down. That was a benefit to Barclays but not a detriment to Lehman.

And so again, if you went back twenty-five months ago, I think you would be saying, and I think Mr. Miller would be saying and he has told you that he would be saying this, he told you that if we were back twenty-five months ago knowing everything that he knows now, he would still be in here supporting this transaction and Lazard, the independent financial people would still be in here knowing everything they know now supporting the transaction. And I think we would be saying to you that this transaction is right with respect to the comp and cure estimates. These are reasonable estimates and the fact that Barclays may, in the cure area not in the comp area, but in the cure area may get an advantage is something that is an advantage to it but not a disadvantage to Lehman.

Now in addition there has been a suggestion that somehow the Lehman estimate of the potential cure was not in good faith. And they show a transaction adjustment document that indicates an increase in the cure and comp amounts. Now, they both went up and then came down and the final comp number was one that was actually almost exactly what was paid.

With respect to the cure number, what Barclays ended up paying was significantly less. Now they knew that. They knew it was a possibility, indeed they knew it was a probability it would be less, they didn't know how much less, but they knew it was almost an inevitability it would be less at the time of the hearing. They knew how much less in November when we put it up on the web site.

So there was no dispute from then on as to what the actual cure amount was, no complaint on that at that time, no complaint for a long time after that in terms of the cure amount or of the comp amount.

And counsel said this morning, and I’m going to try to find the slide that we have that deals with this transaction adjustment issue, because counsel said this morning now we're going to be able to point to a document that went to Weil Gotshal that showed this transaction adjustment but nobody at Weil Gotshal understood it or figured it out.

First of all, that's counsel's testimony, that's not Weil Gotshal's testimony. Secondly, the -- that document, that transaction adjustment document didn't just go to Weil Gotshal. And if you begin this, at slide 182, this is the transaction adjustments as of September 18th, 2008 that movants' counsel, in their argument, suggests without, I believe, any evidentiary basis, that this can be some indication of some kind of bad faith marking up comp and cure amounts. If it is, and I don't

think it is, if it is first this was shared by Lehman, it's a Lehman document not a Barclays' document, and it was shared by Lehman with Weil Gotshal contemporaneously, sent to them on September 18th.

Now counsel testifies that Weil Gotshal didn't understand this and didn't know what to do with it, again that's his testimony. But in addition and more important, if you look at 183, Barclays' Exhibit 212, it shows that Lehman had it but it also shows that Alvarez & Marsal had it on September 18th, before the closing.

If you go on you'll see that Barry Ridings and Lazard, this is Barclays' Exhibit 209 and 184, they had it as well. And as for noticing it or not noticing it, if you go to page 185 of our slides, you'll see that Mr. Coles, a managing director at Alvarez & Marsal, testified that he understood that the cure liabilities would be a "maximum exposure" and that "you typically see a purchaser use its existing business relationships with vendors to negotiate lesser amounts". And he admitted that he got the transaction adjustment documents and probably would have noted those adjustments but he had more important things to concern himself with.

So all of the information that existed to justify this motion they had in 2008. And we believe that if they had come with all this information to court in 2008, the Court would have said that you still thought this was by far the best

transaction that could be done for the estate.

Now let me turn to the so-called additional assets. The categories of assets that were identified on the weekend before the closing. Now counsel for the movants takes issue with our use of the word identified because they say they were added. And as the Court knows, the reason we say identified, and I think the reason that the people who were involved say identified, and you see this in the contemporaneous discussions, is that all of the assets in the business, except the excluded assets, were being transferred. And these assets were all assets that were used in the business. They weren't assets that had been identified, this was going very fast and the assets that had essentially been identified were those that were listed in the APA, but these were assets that once it became clear that a lot of the APA listed assets weren't there or didn't have the value that they were supposed to have, that Lehman had to go back and identify additional assets.

And there's no dispute between us on this one issue, which is that Barclays was very concerned about the overall value that they were getting and they insisted that they be satisfied that the overall value of what they were getting was going to be what they expected or they didn't want to close. No dispute that Barclays was saying we want you to identify additional assets, and if there are not additional assets we're going to have a hard time getting to there on these terms.

So it was important to identify these additional assets and so there was a "scramble" to do so. But the fact that there was a scramble to identify these assets doesn't say anything about the character of those assets, that is whether those assets were already included in the APA because they were assets that were used primarily in the business, and I think the Court has heard the testimony, from both sides, that those assets were primarily used in the business. And the only question is whether they are an excluded asset.

Now, two of the assets, the -- are not, I think in any sense, excluded assets because there's no exclusion of them. One of them on exchange traded derivatives there is an issue as to whether derivatives and exchange traded derivatives are the same thing or they're different things. We think it's a matter of contractual construction. It is clear that the specific controls the general and when they say that you're getting something with respect to exchange traded derivatives even if, contrary to, I think, what all the testimony has been. All the testimony has been the derivatives are not the exchange traded derivatives. But even if you assume that derivatives was the larger category, when they say something specific about exchange traded derivatives, that specific has got to control over the general.

So with respect to each of those categories of so-called additional assets, I want to walk you through what the

evidence -- what the evidence is. Before doing that, though, I want to just remind the Court that while I am addressing this as if it were back in 2008, the Court does still need to think about the Rule 60 context that we have here. And you've got to think about it, I think, in three major areas.

One is the fact that I've already probably spent more time on than I needed to, that they knew all this stuff back in '08 and they can't commune after the fact and use Rule 60 to undo something that they supported at the time, supported on appeal, was affirmed on appeal based on information that they either knew or should have known at the time.

Second issue, though, is that what they tried to do is to impose a new contract on Barclays. They are trying to rewrite this contract. There is a contract. The APA, including whatever it is the Court concludes is part of that, and that contract needs to be interpreted pursuant to traditional contractual provisions. And Rule 60 does not give a court the right, in a Rule 60 proceeding, we submit, to rewrite the contract and impose additional changes that Barclays didn't agree to at the time and would not have agreed to at the time.

I think there is no doubt, and I don't think there can be any doubt in anybody's mind in this courtroom, that if back in 2008 the proposal had been made to Barclays you can have this agreement the way it's drafted as long as you agree to

give back eleven, twelve, thirteen billion dollars more that this transaction would not have been done. I think if you conclude that, and I think you must, then I think as a matter of law Rule 60 does not provide a basis for modifying a contract.

If you look at our slide 234, the movants have said today that they are not seeking to rescind the sale order in its entirety, nor could they at this late date, nor do they want to even void the clarification letter in its entirety, again nor probably could they at this late date. Rather, movants wants this Court to construct an entirely new contract by taking certain provisions that they like and disregarding those that they don't like and rewriting other provisions. Barclays did not agree to that contract. Rule 60 does not allow that type of affirmative relief.

And if you go to slide 235, you will see case after case that provide that, for example, "Courts may not use Rule 60(b) to grant affirmative relief in addition to the relief contained in the prior order or judgment." Or "Numerous circuit courts, including our own, have held that Rule 60, aptly titled relief from judgment or order, may only be used to set aside the judgment or order, not to grant affirmative relief."

And yet, in this case, that's exactly what movants are asking this Court to do. They want you to modify the sale

order to direct Barclays to pay more money than they agreed to. And if we go to slide 236, again, there's case after case that holds, for example -- the Andrulonis case from the Second Circuit in 1994 -- a party's "dissatisfaction and hindsight" where the effects of the bargain are not grounds for Rule 60 relief. Or North Broadway Funding Corp. from the Bankruptcy Court in the Eastern District: "Rule 60, and by reference Rule 924 does not permit relief from a final order, when the effect of such relief would be to free the moving party from calculated and deliberate choices and decisions. It is insufficient," the Court says, "to set aside a court-approved agreement just because a subsequent investigation reveals 'the bargain is more beneficial to one side than to the other.'"

And there are additional Second Circuit cases including the Coffin case from 1989, that make clear that you can't use Rule 60 for this kind of relief.

Slide 237 contains additional cases. For example, a Seventh Circuit Case, Lucille v. City of Chicago, holding that as Rule 60(b) does not allow a Court to "tinker" with the parties' agreement, a motion seeking "to add terms" to a court-approved agreement, must be denied. And also, the Terry Oilfield Supply Company against American Security Bank, a bankruptcy case that's cited there.

I mean, the fact of the matter is that in a Rule 60 case, because of its unusual character, coming the timing that

it does, the law is clear that if somebody commits fraud, you can sanction them; if somebody -- there can be a lawsuit for damages for fraud. It's not to say that if somebody does something that's fraudulent, there's not relief. I don't think there's any fraud here, and I don't think any of those claims would work. But I'm not saying that there are not potential forms of relief. But you can't go in and, after the fact, rework, rewrite a party's contract using Rule 60.

As I say, my primary argument is to convince the Court that it would not want to even if it had the power. But I think that it is important for the Court to keep in mind that you cannot modify -- you cannot use Rule 60 to modify that kind of contract.

Now, turning to the three so-called additional sets of assets. And let me begin -- because this really does implicate the clarification letter and the interpretation of it -- with just a brief reprise of a couple of the legal principles I mentioned before. And I'm now going to turn to the book that's headed "Disputed Assets".

And first, slide 301. It is clear that in the Second Circuit, as in every circuit, a court cannot look beyond the confines of a contract to extrinsic evidence if its relevant provisions are plain and unambiguous; language whose plain meaning is otherwise plain, is not ambiguous merely because the parties urge different interpretations in the litigation. And

those are a decision from this bankruptcy court and from the Second Circuit in Metropolitan Life Insurance Company against RJR.

The Second Circuit has also held, as indicated on slide 302, that any ambiguity in a contract must emanate from the language used in the contract, rather than from one party's subjective perception of the terms. That is, they can't come in and create an ambiguity through their testimony. The Court's got to first conclude that on the four corners of the document, the language is ambiguous. We believe the language is plain.

Even if, in the ordinary course, you could look to extrinsic evidence, as indicated on slide 303, the purchase agreement's merger clause further precludes consideration of extrinsic evidence. Section 13.5 of the APA says this is the entire understanding and agreement. It can be amended or supplemented or changed only by written instrument. As the Second Circuit holds, when you have a -- the purpose of the merger clause is to require the full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to alter, vary or contradict the terms of the writing.

Those are all basic contractual provisions, as is, on page 304, where it says, "Unexpressed subjective intent is irrelevant." And at slide 305, if the purchase agreement is ambiguous, what is relevant is first the parties' performance

of their obligations. Look to what the parties did. And second, look at the extrinsic written evidence that they exchanged. As the cases set forth at 306 make clear, a party's failure to understand the contract it signed is no basis for refusing to enforce it. Ignorance of the terms and conditions of a contract is no defense for a party that has already executed the contract.

And that is exactly what you have here; people saying we didn't understand what we were signing; we didn't know -- we didn't see this; it went in at the last minute. Now, they don't say that when it went in at the last minute it took them years to raise it. That might have been a reason why maybe they signed it my mistake and then when they read it the next day or even the next week they would come forward. So their explanation doesn't really fit the facts. But even if it did, ignorance of those terms is not an excuse.

As the cases at 307 make clear, a contract should not be interpreted to render some of its provisions meaningless. When they don't like some provisions, like the provision with express to exchange-traded derivatives and that parenthetical, they say let's just ignore it; let's make it go away; let's interpret the contract as if it didn't exist. That's not permissible.

Now, as I said, the plain text of the purchase agreement defines purchased assets as "all assets used in

connection with the business." And as you can see from our slide 308, that includes the assets that are involved here. Because as shown at slide 309, there is no and can be no dispute that the clearance box assets at DTC, the margin held to secure exchange-traded derivatives, and the 15-3c3 (sic) securities, were all LBI assets used in the business, as Mr. Greery (ph.) would say, "capital B".

Now, in addition to being included in the definition of purchased assets, each of the disputed assets was expressly listed in the clarification letter. Now, I understand that with respect to the Rule 60(b) motion, I need to address the appropriateness of that. But with respect to the motion to enforce the contract that one of the movants has made, the fact that this is specifically mentioned and specifically identified here should erase any doubt that might otherwise have existed, based on the general provision of the APA.

None of the assets were excluded. And I want to put a caveat with respect to the issue, with respect to the derivates and exchange-traded derivatives that I've already alluded to and come back to that. But other than that, I think there is and can be no dispute that none of these assets were excluded assets, since they are not excluded and they are included under the terms, either of the APA itself or of the clarification letter, and indeed we believe under both of them, those are assets that belong to Barclays.

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Now, let's turn to the performance of the parties, because the Court will recall that that's one of the -- if you get to the point of extrinsic evidence, our slide 314 begins the discussion of the performance of the parties. And the trustee and his representatives knowingly approved post-closing transfers of nearly two billion dollars in proprietary margin and DTC clearance box assets.

And as you can see from Barclays' Exhibits 517 and 470, among many others, in September and early October, the trustee approved the transfer to Barclays of assets that we say belong to us, and which they now dispute. We think that performance of the contract by the parties is very relevant to an interpretation of what that contract meant.

Now, in addition to that, the trustee's lead counsel, and 30(b)(6) designee, Mr. Kobak, admitted in testimony that the plain language of the clarification letter provides that Barclays is to receive LBI's clearance box assets at the DTC. And that's at page 319. And question: "In that Schedule B which is listing those clearing box assets, that was made according to this provision to list the purchased assets including Lehman proprietary assets that were in the clearance boxes, correct?

"A. That's correct.

"Q. And what you're saying is that the APA, including the clarification letter, provides that Schedule B lists securities

and trading positions transferred under the purchase agreement to Barclays, correct?

"A. Yes."

And one more time:

Q. "You understood that the Schedule B listed LBI's securities that you considered to be proprietary and not customer securities, correct?

A. "That's correct."

Now, the trustee's lead counsel and 30(b)(6) designee -- this is their 30(b)(6) representative, Mr. Kobak -- further admitted that the trustee's proposed reading of the clarification letter's clearance box provision, as including only customer assets, would render that provision superfluous.

Slide 320 deals with this. And remember -- I think it was common ground, that you are supposed to interpret a contract so as not to make any of its provisions meaningless. And yet Mr. Kobak testified that:

"Q. Paragraph 8 would have transferred all the customer assets in the clearance boxes to Barclays without any reference to clearance boxes in paragraph 1, correct sir?

"A. I believe so.

"Q. Okay. So if we interpret paragraph 1 which says that Barclays gets such securities and other assets held in LBI's clearance boxes as being limited to customer assets, this provision is simply redundant to paragraph 8, correct?

"A. There'd be no need for it."

Now that is not only rendering that provision meaningless, but what it's saying is all of the effort to list clearance box assets was just meaningless, irrelevant. All of the scramble to identify this additional asset, all of the extent to which it was considered in terms of calculation of what the value was that was going to Barclays, all of that was just meaningless because it's just redundant.

Continuing on at 321. The version of Schedule B delivered to Barclays before the closing listed 1.9 billion dollars, the overwhelming majority of which were LBI's DTC accounts. 1.9 billion dollars. This is what Barclays is being told it's getting as part of the deal. And yet, what the movants say is that was not intended to be included.

The debtor -- and this is at 322 -- acting through Weil Gotshal on September 30, 2008, filed the final version of Schedule B. And there was a joint motion by the debtor and Barclays to file the schedule under C as assets -- under seal, as assets "transferred under the purchase agreement." No doubt that these are identified as assets transferred under the purchase agreement. They didn't object. They got it. This is part of the course of conduct, the performance, and it is part of Barclays' reliance on what is being done. No one ever complained that this was inconsistent with anybody's understanding, for the very simple reason that it was not. It

was not inconsistent with people's understanding. This is exactly what everybody's understanding was. That's what the scramble was about over the weekend. That's why they listed it. They didn't list it to be meaningless. That's why they included it in calculations of the value of what Barclays was getting.

The movants' motion would require you to undo all those documents, all of that history, ignore all of that, because they now say they have a disagreement with it. They didn't read it, they didn't understand it, it happened too fast, or some other explanation. But I respectfully suggest to the Court that we can't just ignore all that history. We can't ignore all that documentation. We can't ignore that performance of the parties. We can't ignore the fact that the argument that they put forward would require significant portions of the letter and APA to be just rendered meaningless, and as Mr. Kobak says, redundant.

Now, there's no doubt that everybody got a copy of Schedule B on the day it was filed. The argument that says that somehow the DTCC letter to which the movants were not intended to be a benefited party, somehow changes this, respectfully, I think makes no sense, Your Honor. For one thing, as we discuss at slide 327, there's no conflict between the clarification letter and the DTCC letter. Every witness that's testified has talked about the difference between

accounts and the content of the accounts. Movants' counsel points to a portion where it talks about the trustee giving permission for certain securities to be transferred. That is separate from the discussion of what is and is not an excluded asset. And in fact, it shows that the parties knew how to distinguish between the accounts and their contents. They did so on some occasions. But when they talked about what was included and what was excluded, they excluded the accounts and included as a purchased asset, the securities in those accounts. And I don't see how that could have been any clearer.

At 328 we set out Mr. Rosen's testimony about the distinction between accounts and the assets held in the accounts and how this is a well-recognized distinction. The DTCC's own representative acknowledged -- and this is at slide 330 -- that there's a fundamental distinction between owning a DTC account and owning securities held in the account. And the DTCC letter agreement specifically lists the accounts as the excluded assets, not the securities in those accounts.

Even if you had to reconcile the clarification letter with the DTC's agreement, the principle that the specific governs the general, again, would support our interpretation of the clarification letter, because the clarification letter is more specific than the DTCC letter on the disposition of the LBI assets in its clearance box -- in the clearance boxes. And

if you go through that language which is at slide 331, you will see exactly the detail with which the clarification letter provides that the purchased assets include "such securities and other assets held in LBI's clearance boxes as of the time of the closing."

Now, you can't read that language, I respectfully suggest, in an ambiguous way. It says "such securities and other assets held in LBI's clearance boxes." That's a purchased asset. And I understand the issue about whether the clarification letter is enforceable or not, but if it's enforceable, it clearly provides that.

And if we were arguing back twenty-five months ago as to whether that was a sensible provision, I think everybody would be here telling you that these were part of the assets that were identified in that scramble. These were part of the assets that were identified because the assets that Lehman was supposed to give Barclays didn't exist anymore. Many of them had disappeared entirely. A lot of those that had remained were reduced in value; they were continuing to decline in value. Barclays made very clear, we're not prepared to go forward unless we can identify additional assets. And so these assets were identified.

And if we were back twenty-five months ago, I think everybody would be saying that this ought to go forward. Because if it didn't go forward, the alternative was a disaster

for the estate, for its employees, for LBHI, who had guaranty obligations, for everybody involved. And this was a good-faith effort undertaken over that weekend to identify additional assets that could give Barclays that comfort. And I think everybody would be telling you, if we were back twenty-five months ago, that that would make sense -- it'd make sense to do that.

Now, counsel for the movants said that Weil Gotshal was not involved in the negotiations with DTC, and they implied that that meant that because Weil Gotshal was doing the clarification letter, the clarification letter could not have been drafted to account for the DTC letter. That, of course, is not true. Because first, if you go to slide 334, as Mr. Rosen testified, the Weil Gotshal lawyers were fully briefed on the DTCC letter and then changed the clarification letter.

There's no dispute that the clarification letter was changed as a result of this. And in fact, while the clarification letter was still being drafted -- this is slide 335 -- the trustee sent Weil Gotshal the final DTCC letter. True, Weil Gotshal was not involved in negotiating it, but that didn't mean they didn't have it, weren't briefed on it, and didn't include and indeed change the clarification letter to include references to it.

Slide 336 shows how Weil Gotshal's 4:36 a.m. draft of the clarification letter was changed to expressly recognize the

DTC letter and provide that Barclays was to receive the clearance box assets. So at the same time they were revising it to take into account the DTC letter, they are making clear that the clearance box assets are purchased assets. Doing those two things together would make no sense, Your Honor, if the DTC letter invalidated the very provision they're putting in.

The next draft, which is at 337, the 5:22 a.m. draft, revised the description of the DTC letter, refined it and corrected it, and broadened Barclays' right to receive the assets in all of LBI's clearance boxes. Now, if you've got a DTC letter that's taking away what you're drafting, it makes no sense to continue to draft this way. You've got provisions that would be just rendered meaningless if you took the movants' argument at its word.

The drafting history would just make no sense, as Cleary Gottlieb lawyer, Mr. Rosen testified in his testimony, and it's in slide 338, the drafting history would have made no sense at all if Barclays was giving up the right to any of the clearance box assets.

"A. It would make no sense to anyone who had heard the resolution of the DTC situation. Would never have drafted these provisions as they were drafted."

Now, on the Friday before the sale hearing and during the weekend before the closing, lawyers for LBHI and LBI

understood and intended that the assets in the clearance boxes at DTC were purchased assets. This is after the DTC issue has been raised. It says, "This is the additional collateral that we would deliver."

Now, what they want you to believe is that when the DTC letter was finalized, that that took away all of this asset that was supposed to be delivered. This was part of the asset scramble. This was part of what Lehman was promising Barclays. This was part of what was necessary to get the deal done. And yet what they're saying is that somehow this was all nullified by a DTC letter that was done contemporaneously and indeed before the clarification letter was finally finalized. And indeed the clarification letter was modified and changed to adapt to the DTC letter.

Now, after the closing, what happened? You've had the DTC letter; you've had the modification of the clarification letter; they've been signed. It's after the closing now. After the closing -- this is number 340 -- lawyers for LBHI and LBI continued to confirm to Barclays that the assets held in LBI's clearance boxes, listed on Schedule B, were purchased assets.

This is performance. This is an admission. This is clear, uncontradictable evidence that this is what the parties intended. This is -- they meant the normal meaning of the words. The plain meaning of the words was Barclays got the

clearance box assets. And here they're saying it. A few days later, a final version of Schedule B is prepared, after closing, by lawyers representing LBHI and LBI, and it listed several categories of assets totaling approximately 1.9 billion, the overwhelming majority of which were LBI's DTC accounts.

If you look at Barclays' Exhibit 757, which is on slide 341, you will see the large amount of assets, all but 36 million of the 1.9 billion listed, were securities in Lehman DTC clearance boxes. And this is what they're saying, the week after the closing, is part of the purchased assets. This is what Barclays is relying on.

If you look at Barclays' Exhibit 807, slide 342, again, after the closing, lawyers representing LBHI and LBI prepared another summary of the transaction that again admitted that the securities set forth on Schedule B to the clarification letter, i.e., the unencumbered box, were purchased assets. They're listing purchased assets on Barclays' Exhibit 807. That's the parties' performance. That's the parties' objectively manifested interpretation. That's the contemporaneous documentation; not people's after-the-fact testimony; the contemporaneous documentation.

Another example of that, Barclays' Exhibit 742, slide 343. September 26, 2008, Weil Gotshal sends an e-mail to Barclays' lawyers at Cleary, again, purporting to list the DTC

clearance box assets as securities that Barclays is actually getting. There's no suggestion here that somehow that's been trumped by the DTC letter. Nobody thought it had been.

Again, Barclays' Exhibit 320, slide 344. Weil Gotshal sends out to a lot of people, including Alvarez & Marsal, a list that is an attempt to identify what it is Barclays got and didn't get. What does it say about securities and other assets held in Lehman Brothers' clearance boxes at the time of the closing? In purchased assets, that's what Alvarez & Marsal was told. That's what everybody believed.

Alvarez & Marsal prepared a presentation to the committee. This is Exhibit 131, slide 345. It listed the assets purchased: 1.9 billion dollars of the unencumbered box, which, as the Court has seen, is the DTC accounts.

Phillip Kruse was the 30(b)(6) witness -- this is slide 346. And I want to take a moment on this testimony, because he was a 30(b)(6) witness for both LBHI and Alvarez & Marsal. And the movants' counsel have made a big point about how when somebody's a 30(b)(6) witness the party is tied to that testimony, can't get away from that testimony, is bound by that testimony. Well, this is what Mr. Kruse testified:

"Q. Sir, I mean as of the time of the presentation, Alvarez's understanding was that the sale transaction, specifically the clarification letter, did convey the unencumbered box to Barclays and that was worth approximately 1.9 billion dollars?

"A. Our understanding at the time was being conveyed here, yes. That was transferred."

Another example, Barclays' Exhibit 756 at slide 347, September 25, 2008, to the committee's counsel, again showing the DTC assets as purchased assets.

Now, in contradiction to all of that, what they say is that the DTC letter somehow trumped all that, even though it was drafted separately, drafted before the clarification letter was signed, the clarification letter was more specific, the clarification letter was modified to take into account the DTC letter, all of the performance after both letters had been signed and put to bed, was that the clearance box assets went to Barclays. They now say, based on the testimony of a witness who was not at all involved -- admittedly not at all involved in drafting the clarification letter, that somehow that all ought to be done.

That is exactly the kind of unexpressed, subjective intent that's contrary to the plain language of the agreement and contrary to all of the documentary extrinsic evidence that is simply inadmissible, and if it were admissible, we think would be wholly unreliable. There's no evidence at all that Barclays ever believed that it was giving up the clearance box assets or that anyone ever told them they were giving up the clearance box assets.

If you're going to have an expressed intent, it's got

to be expressed to the parties doing the agreement. That -- no one has ever testified that that intent was expressed to the people that were drafting the clarification letter. Indeed the drafters of the clarification letter denied it.

If you look at slide 352, you see Mr. McDade, Mr. Miller, Mr. Rosen, Mr. Ricci, all testified that no one ever told them, they never came to believe, that anything between DTC and Barclays changed in any way the deal that Barclays was doing with Lehman. These are the people that were involved. These are the people whose objective manifested intent might be relevant if you found ambiguity.

And at slide 353: "Mr. Rosen, as you understand it, did Barclays' DTC letter agreement affect at all the purchase of Barclays of assets held in the clearance box accounts?
"A. No, not at all."

And then the question: "Did anyone ever suggest that?
"A. I did not hear that in any of the conversations."

Moreover, the new theory that Barclays gave up the clearance box assets is directly contrary to movants' other argument that Lehman had agreed to give the clearance box assets to Barclays in order to get Barclays to close. Remember counsel for the movants talking to you about how there was a holdup over the weekend and Barclays was insisting on more assets and so they came up with the clearance box assets and exchange-trade derivatives and 15c3? Now, it makes no sense,

on the one hand, to say Barclays made us come up with these assets in order to close, and yet say, except we didn't really come up with the assets. You can't reconcile those positions, Your Honor, and you can't reconcile movants' position that the clearance box assets were not part of the purchased assets with any of the testimony of the people who were involved negotiating the APA or the clarification letter or with any of the contemporaneous documents that went back and forth or with the parties' performance afterwards, in which they all acted as if these were Barclays' assets.

Now let me turn to the exchange-traded derivatives. As we show on slide 361, because the exchange-traded derivative margin was an asset used in the business and was a deposit associated with the business, the plain text of the APA includes that ETD margin as a purchased asset. It was not an asset that had been identified or quantified until the weekend before closing, but it was something that was included in the APA. And so again, if we were back twenty-five months ago, and we were saying -- we brought the clarification letter to the Court and we said we want you to expressly approve this, and we've gone through comp and cure, and we've gone through the clearance boxes, and we've shown how those were already included, we'd now be saying this is just an identification of something that was already included. It's something that a) was part of the APA to start with, and b) the identification

of it was necessary in order to get Barclays back to the table after the deterioration of the value of the assets that Barclays had originally been promised.

And so I think what we would be saying to the Court is that this is a provision of the clarification letter that is entirely consistent with what went on before and is essential to get this deal done. And I don’t see how anybody back then, given the alternative that the Court was faced with, and given the fact that this was clearly an asset that was used in the business, would have had an objection. And I think that if the Court thought about it back then, even if these questions had been explicitly raised to the Court, the Court would have concluded, just as Weil Gotshal concluded, and just as the movants themselves concluded back then, that this made sense. Because back then, when they knew what was happening, they didn't object; and they didn't object because they knew it was included as part of the business, and they knew it was essential to get the deal done.

Now the clarification letter, as the Court knows, had lots of drafts. And it is true that the parenthetical that says "and any property that may be held to secure obligations under such derivatives" was added late. And I think the reason it was added late was quite clear. And that is because first Barclays had tried to put in a broad provision; Weil Gotshal had objected to the broad provision. And so what Barclays

proposed was a narrow provision that dealt with exchange-traded derivatives.

And everybody understood back then that all of the exchange traded derivative margin was a purchased asset. Again, trustee's 30(b)(6) designee, in this case, Mr. Kobak: "You understood that what was in these OCC accounts," the exchange-traded derivatives accounts, "what are referred to as exchange-traded derivatives?"

"A. Yes.

"Q. And you understood that they exchange-traded derivative discussion in the APA did not limit the collateral to customer collateral, correct?

"A. It just referred, I think, to margin or collateral. I think in the final version of the clarification, it's that language we saw. It wasn't limited in any way, no."

"Q. It said 'any property', it wasn't limited to customer property, correct?

"A. It said 'any property', yes."

The trustee then went on -- and this is slide 364, to sign three separate agreements approving the transfer of exchange-traded derivative margin to Barclays, including cash margin -- including cash margin. Because everybody understood that nobody would take on the liability for exchange-traded derivatives in that volatile period without getting all of the margin, all of the property securing those derivatives. And it

didn't make any difference whether that property was securities or cash or other property. What mattered is that this was what had been put up to secure those obligations.

And the Court heard testimony from several people, some from Barclays some not. All of them testified there was no practical way anybody, particularly in that volatile environment, would take on exchange-traded derivatives without taking on all the margin for it. And the trustee understood that back then and signed three agreements. There was the transfer and assumption agreement, Barclays' Exhibit 3A at paragraph 1(a), in which it said that "Lehman hereby sells, signs, transfers and sets over, among other things, all margin deposits held by OCC."

The collateral account agreement. It says, "LBI has assigned to Barclays all rights in securities, cash and other property, the collateral pledged by LBI to the OCC and held for OCC's benefit at JPMorgan Chase." And then of course the clarification letter itself, which provided it got the exchange-traded derivatives and any property that may be held to secure obligations under such derivatives.

At trial, Mr. Kobak testified that he understood when he signed the TAA that all of LBI's OCC margin deposits were being transferred to Barclays, slide 365: "When you signed this, you understood that LBI was transferring all of its OCC accounts to Barclays, correct?

"A. Yes.
"Q. And you understood that that transfer included all of the margin deposits held by OCC with respect to those accounts, correct?
"A. Yes."

Again, the parties' performance of their contract -- they knew what it meant and they were performing it.

And slide 366, Mr. Kobak admitted that he knew that these OCC accounts that were being transferred to Barclays included LBI proprietary stuff. He had to know that. But he admits it.

Now, the parties involved in the transaction talked about this too. You've got the Elizabeth James testimony that's displayed at slide 367 where she testified that there was an actual discussion in which it was expressly discussed that the margin for the exchange-traded derivatives would be transferred. And the Court heard, as I said, uncontradicted evidence that nobody would buy this stuff without the margin associated with it.

That's not just James' testimony. If you look at Barclays' Exhibit 217 and slide 368, you see contemporaneous evidence of where that was being discussed on Friday, September 19th. And if you go to Barclays' Exhibit 220 at slide 369, you see the beginning of three or four really critical documents. First the parties inserted a provision in the sale order that

specifically addresses the transfer of LBI's OCC margin to Barclays. And you see that this includes -- and we've put it in red -- all securities, cash, collateral and other property transferred to accounts of the purchaser at OCC.

And this was put in so that OCC could be sure that when this was transferred, they would continue to have their rights to it. There would be no purpose for this provision if all of this was not being transferred to Barclays. Again, you can only support the movants' argument here by ignoring the clear language of the contract and ignoring the documented performance of the parties under that contract.

Now, going to Barclays' Exhibit 233 and slide 370, the OCC repeatedly confirmed with all the parties that it was transferring all of the EDT margin to Barclays. For example, on September 20th, Saturday, OCC is seeking to confirm its understanding that the LBI accounts and all positions, cash and securities collateral, that are held by OCC in respect of those accounts, are intended to be transferred to Barclays. And OCC goes on to note that it's holding nearly a billion dollars in cash.

Barclays' Exhibit 262, slide 371, the next day, OCC says, "Having heard nothing from you with respect to cash held by OCC, in respect of the LBI accounts, and in accordance with the terms of the transfer and purchase agreement, all such cash in the accounts will be transferred to Barclays, assuming that

the transaction closes." And of course, the transaction closed and it was transferred, because that's what the parties intended. And at trial, Mr. Kobak, the trustee's representative, testified that he read and understood this at the time. That's at the May 5 transcript at page 112, lines 12 to 21.

Now, why would the debtor agree to this? Why does this make sense? Three reasons. First, it's already part of the purchased assets, because it's all assets used in the business. Second, they're going to lose it all anyway. Even Mr. McDade testified that he thought they were going to lose it. All of this stuff -- they just lost -- the Chicago Board of Trade or one of those organizations, had already closed them out and taken all their assets. They knew they were about -- this was about to happen. The evidence is uncontradicted that these margin requirements were not going to be given back to them, because they were going to get closed out; they were going to lose it. So they're given the sleeves of the vest. They're given something that is helpful to Lehman perhaps -- helpful to Barclays, perhaps, but not hurtful to Lehman. And the third reason is that people aren't going to start taking bits and pieces without getting the whole.

So they had -- it was already given. It didn't have much value to them. They needed to do it to get the deal done. All of those reasons, if we were back twenty-five months ago, I

would be saying to you -- or somebody who was more knowledgeable about bankruptcy law would be saying to you that this is a deal that needs to be approved.

Now, let me turn to the 15c3 account. Again, the 15c3 account was within the broad definition of purchased assets in the original APA, because it is clearly assets that are used in the business -- primarily used in the business -- capital B. It was also specifically included in the clarification letter. And it was also one of the three so-called additional assets that Lehman came forward with and identified in order to convince Barclays to close.

So again, to exclude the 15c3 assets, the 769 million dollars, you've got to ignore not only the plain language of the clarification letter, you've got to ignore the reason it was put into the clarification letter. It was put into the clarification letter to assure Barclays that it was going to get this additional asset. This was part of convincing Barclays to close. And so if we were back twenty-five months ago, I would be saying this is an essential part of the deal. Not only was it already a part of the deal when it was signed, and it's been subsequently identified, but you can't take it out now, because if you do, you're taking away part of what was bargained for.

And the drafting of this is, of course, what has been noted by movants' counsel. And that is that at some point

somebody raised an objection and raised a question as to whether the draft that had, up until then, simply provided that Barclays got it, was consistent with regulatory provisions. Now, we think we're entitled to this because we think we've established that there's no regulatory inhibition. And we've made the point to the Court that regardless of how you read this language, we're entitled to it because there's no regulatory inhibition on our getting it.

But if there is a regulatory inhibition on our getting it, then what was specifically done was to write into the clarification letter language that made clear that we were going to get equivalent securities. There is not any evidence at all that anyone ever said to Barclays that there was any chance that we would not get the 769 million dollars. I want to repeat that, Your Honor, because that's dispositive. There's not any evidence that anyone said to Barclays that there was any chance we're not going to get the 769 million dollars, one way or the other.

They talked about the regulatory inhibitions, but nobody came and said this means that you may not get anything out of 15c3, and that, of course, would have been quite inconsistent with the economic deal that had been agreed to.

Now, counsel for the movants said that we gave up a billion dollars of cash, which is true, we did. And he said that somehow that indicated that we must have thought our

position was weak. When we get more we're being a pig, and when we give up things we're being weak. So it seems that there was probably no way that Barclays could have won under those circumstances. But the fact of the matter is, that regardless of why they gave up the claim for a billion dollars of cash there, there was nothing that was said that took away our right to get 769 million dollars of securities one way or the other.

Now, there is one particular document that I would like to -- yes, 378. This is a timeline. And if you will see that between 3 and 4 a.m., Barclays and Lehman lawyers discussed the 15c3-3 cash and agreed to remove it from the deal. Now, what they did then was to make clear that we would get at least the securities or equivalent value. And they say the "or value" is just redundant. Again, they're trying to write out of the agreement part of the language. In fact, that was put in expressly to try to give Barclays the assurance that if there was a regulatory problem -- which they didn't think there would be -- that they would be able to get those assets.

Now, as I've said, we have said that we don't think that there was a regulatory problem. We've set that forth on slides 412, 413 about why the trustee was legally authorized to transfer the property. And we think that that's right. But regardless of that issue, the fact that we were entitled to this because we bargained for it, and it was part of what we

were entitled to get and part of what we relied on in closing, is the primary argument that I want to make to the Court.

Now, if you turn to screen 411, which has the actual language in the clarification letter, it says at the end, "or securities of substantially the same nature and value." That language would be meaningless if the trustee's and other movants' position is accepted. And it would have been inconsistent with what all of them said at the end of the negotiations, because they all thought, at that time, that they'd gotten the billion dollars, but they were giving up 760 million dollars -- -69 million dollars, which was a good deal for them.

And the fact that this was unconditional is shown by the continuation of the timeline, which is at 420. Remember I pointed out the earlier draft, and at 4:36 a.m., you have the phrase "or securities of substantially the same nature," and then they add "or value." And there's no point in adding the words "or value" unless you are making sure that we're going to get equivalent value.

There's an argument that I want to come to that they make that says the "or" clause was added because you might have to shift things around. If you're just shifting things around, you wouldn't need the "or value" part. In addition, I want to go directly to this after-the-fact argument that the "or" clause was intended merely to allow them to shift around the

securities if there was no regulatory problem. That comes, as counsel for the movants say, from a Weil Gotshal attorney, Robert Messineo. He's the only person who has raised this. And if you go to our screen 425, he was not part of the hallway conversation where this was all agreed to. More important, he did not communicate his understanding of the phrase to anyone at Barclays. He didn't even communicate his understanding to his own partner, Harvey Miller. This is unexpressed subjective intent taken to the tenth power. This is the unexpressed subjective intent of somebody who wasn't even participating in the negotiations.

It was never conveyed to Barclays. It was never even conveyed to his partner who was doing the negotiations. And if you look at screen 425, this is Harvey Miller:

"Q. Was it your understanding that if LBI or the estate was no longer in a position of transferring the specific security because it had matured, it would have the ability to transfer an alternative similar security of the same value?

"A. I don't think that was contemplated at the time this was drafted."

This was the person who was doing the drafting for the estate. He doesn't even think that this argument that the movants have come up with was even contemplated, let alone told to Barclays. Even if he had thought it was contemplated, it wouldn't be relevant unless he expressed it to Barclays, which

he clearly didn't do, because he didn't even know about it. But this just shows you how far afield they are to try to find an interpretation of that "or" clause that doesn't render the entire clause meaningless.

Their argument is that you've simply got to ignore that clause that was put in, obviously, late, for the benefit of Barclays. And you've got to ignore what they wrote; you've got to ignore why they wrote it, which was in order to identify additional assets for Barclays; and you've got to ignore what they did after it was all signed. Because after closing -- this is screen 426, Barclays' Exhibit 287 -- the movants' counsel continued to admit and continued to say to the committee counsel, that Barclays "gets securities, 263 million dollars." No mention that there's any contingency or conditionality to this. They say this was a contingent promise. There's nothing here that indicates it was contingent. And there's nothing on September 22, BCI Exhibit 288, screen 427, from Mr. Miller to the committee advisors in which they say that Barclays is getting the 763 million dollars. Nothing contingent or conditional there.

There was nothing contingent or conditional in October of 2008 -- on October 16, when Mr. Miller, in a state of the estate presentation said -- and this is at screen 428, Barclays' Exhibit 485 at page 58: "As part of the closing, because Barclays was taking the customer accounts, they got the

700-odd million dollars in securities." They got the securities. Again, Barclays' Exhibit 839, screen 429. This is the committee now. And the committee's congratulating themselves. They're congratulating that they only gave Barclays the 763 of securities, and they got the rest. So what they are saying is, not only is Barclays entitled to the 763 million dollars in securities, but this was a good deal for them. They're happy with the deal. They're not trying to undo the deal then. Because they knew if they tried to undo the deal then, they would open up the billion dollars or the billion and a half dollars that they were getting.

Again, Barclays' Exhibit 847, screen 430. We won the issue, the committee advisors say. Barclays is only getting the securities. We won. We got more than we expected. And Barclays' Exhibit 811, screen 431, they're again congratulating themselves. They're saying because they refused to consent, the company got more aggressive and ultimately cut a deal with Barclays in which Barclays only gets 763 million dollars of the securities in these deposit regulatory accounts.

I respectfully suggest, Your Honor, that you cannot -- could not even, back in October or September of 2008, reconcile the movants' position that somehow this was contingent with, 1) the fact that it was part of the definition of purchased assets in the original APA; 2) the express language of the clarification letter, that they have to render meaningless to

support their argument; 3) this was part of what was bargained for by Barclays and relied on in Barclays in agreeing to close the deal; and 4) the post-closing performance and conduct of the parties is all consistent with our interpretation and inconsistent with their interpretation.

Let me ask you just to look quickly at Barclays' Exhibit 332, which is screen 432. And I will show you another version of this. But the important point I want to emphasize is this is the committee recognizing that this is part of what Barclays bargained for and needed to get. And the same point is made in Barclays' Exhibit 814B, which is screen 433 and Barclays' Exhibit 382, which is screen 434.

To summarize, if we were back twenty-five months ago, I would be saying that if the clarification letter had been brought to you, the letter ought to be approved for three reasons: one, it basically reflects the original deal that was done, because the so-called additional assets were all included originally; and second, it's essential that they be given now, because otherwise Barclays is not going to do the deal. Everybody knew that then. Everybody knew that because of the deterioration of values, these things had to be identified, and they could not have given them with one hand and take them back with the other. Third, I'd be emphasizing what I know the Court already knows and what everybody has said, which is that this deal was a far better deal for everybody than the

alternative. There was no other practical alternative. And what Barclays agreed to was, in some cases to give up more than it could have gotten, maybe that billion dollars. But the deal was done and certainly everybody knew, on that Monday morning, that Barclays was not going to part with what was in those clarification letter paragraphs. Everybody knew that Barclays was not going to renegotiate the deal then. And everybody knew that if Barclays closed, they were closing in reliance on those provisions, which is exactly what happened. So I think that if we were back then and if everybody in this courtroom is honest about it, they would have to tell you that they know that if it had been raised, everybody would have urged the Court to approve it.

The second thing I would say is that we're not back there. We are now in a situation in which Barclays has made the commitment; it has been integrated; and what they're coming in and asking you to do is to rewrite the parties' contract after the fact. And that simply is impermissible as a matter of law. They cannot ask this Court to do that. This Court can't give them that relief. That doesn't mean that if they could make out an argument that somehow they were defrauded or the like, they wouldn't have a remedy. It's just not this remedy.

Third point. They knew all of this back then. And I've spent maybe more time than I should have in a hot

courtroom going through some of this stuff. There's a lot more here that I could have gone through. There's a lot more that we've gone through at trial. But each of the movants knew each of these things back then. And they put it in their pocket, and they've brought it out only after the markets have recovered and Barclays' risk is over with. And that's not something that 60(b), or insofar as I'm aware any principle of law, allows or should allow.

The fourth thing that I would say -- and I've alluded to this before -- and that is that Barclays did what it did in reliance on what was written, signed, filed with the Court. That reliance is something that cannot now be undone. Having relied on what they signed, what they had, what they knew, what they with us filed, that -- it is simply neither just nor, I think, consistent with the law, to revise this transaction at this date.

This is not just a question of the finality of bankruptcy law and the finality of bankruptcy proceedings, although I think that is important. This raises a much more fundamental issue as to whether a party who makes an enormously risky investment, pursuant to a contract that is signed, executed, filed with the Court and then performed for months, has a right to rely on that written, executed, court-filed, performed contract, or whether some parties to that agreement, even if they could identify a problem -- let's say they

identified a problem here. Let's say they said, aha, this clarification letter was never formally approved by the Court, but let's not do anything now. Let's put it in our pocket and see how things turn out. And then let's go to the Court -- which they did -- and cited it to you. They cited the clarification letter to you. We did too. But so did they. In the weeks after the closing, both of us came into court and wrote motions and papers in which we cited and relied on the clarification letter. This Court made decisions based on the existence of the clarification letter. They took the benefits of the deal that the clarification letter made possible.

And when that purchase agreement, including the clarification letter, was attacked on appeal, they went into the appellate court and argued for affirmance of the sale order. Not just affirmance of the APA, but affirmance of the entire purchase agreement, including expressly the clarification letter, whether this Court approved it or not.

At the appellate level, the clarification letter was presented to the appellate court, not just by us -- although it was by us -- but by the movants as well, as part of what this Court had done. And it was affirmed by the appellate court as part of what this Court had done. And we've cited law, we've cited the mandate rule, we've cited a variety of legal principles that talk about the importance of that. But I’m speaking now, not in terms of those legal principles; I’m

speaking now about the fundamental fairness of what's gone on here; the fundamental fairness of the fact that Barclays stepped up, when nobody else would, took an enormous risk, did so in reliance on a written, executed document that the movants' signed, that was filed with the court, and that they performed.

And whether they had a problem or not, whether there was a defect or not, back in 2008, they had no right, it is not fair, there's no legal principle that justifies, them putting it in their pocket and then waiting to come back into court after they've seen how the market has turned, and say to this Court, rewrite that contract.

Thank you very much, Your Honor.

THE COURT: Thank you. Is there any desire on the part of the movants to further argue? If so, as you may be able to observe, I'm suffering a little bit from a head cold and would just like a five-minute break to blow my nose and take a decongestant.

MR. GAFFEY: Your Honor, I can say, if we take a five-minute break, I can cut what rebuttal I have down to under ten minutes and get it closer to five.

THE COURT: I'm not trying to shut anybody down.

MR. GAFFEY: I think it would be a useful exercise for me.

THE COURT: Let's take five minutes.

MR. GAFFEY: Thank you, Your Honor.

(Recess from 6:51 p.m. to 7:01 p.m.)

THE COURT: Be seated, please. I want to confirm that it is much warmer in here than it is in my chambers. And I recognize that we've been here for a long day.

I wanted to make a brief comment before hearing from the movants again, because there's a theme in Mr. Boies' argument which I think is true insofar as it relates to my state of mind, but may be a debatable point as it relates to the standard under 60(b) that I should be applying.

A lot of his argument related to what would I do as of twenty-five months ago if I knew all the facts that were in the record today. And in effect, that is how I had been thinking about this case from the onset. But I'm not sure if that's the right way to think about the case. And so I want to give the parties an opportunity to reflect on that relative to the 60(b) standard, and in particular -- and I realize this isn't a lot of notice -- but you've been hearing the same argument I've been hearing -- in particular in reference to any further comments that the movants wish to make.

MR. GAFFEY: Your Honor, on that particular issue, which obviously we had made note of, it's generally my view that we obviously will deal with this at some point in the post-trial briefs, because it goes to the legal issues, but let me address it very briefly now.

I think that the formulation, what would have been done, what would the Court do twenty-five months ago if it knew then what it knows now, is an argument where the barn door closed a long time ago. I think that Rule 60(b), and particularly in this context, Rule 60(b) requires the Court to look at whether there was a mistake made to the order, a mistake made in connection with or fraud or misrepresentation in connection with the order that was actually issued on the record that was actually developed. And I think that makes complete sense. Because I think any other formulation would require the hypotheticals, which is what Mr. Boies' question is close to being: what would the Court have done if a different record had been made?

It's not enough to say -- to me, it's a variation on no harm no foul. It's -- to be able to say now, well, look, we were the only game in town; Barclays was the only bidder; at the end of the day it was a good deal because Barclays was the only bidder. I think that the danger of going down the road of what would the Court have done if it knew then what it knows now, is we don't know everything it would have known; and I'll give you one example.

I think if the hidden benefits to Barclays in the deal -- and let's everybody assume for the moment I'm right about the hidden benefits, the five billion dollar discount and the understated cure liabilities and the understated bonus

liability and the fact that the deal was built for Barclays to take an immediate embedded gain of what our experts call eleven billion dollars. Well, on the state of the play at the time, against the disclosures that actually were made inter se and to the Court, there was one bidder. There's no way to tell now, twenty-five months later, whether if there was an eleven billion dollar embedded gain in the deal, there might have been another one.

Now, Your Honor will recall Mr. Ridings' testimony at the sale hearing. He was asked -- and I don't recall by whom -- but he was asked on cross-examination about the process that he had followed or not followed with regard to shopping the company around. And Mr. Ridings' testimony -- and again, I'm paraphrasing and I'm uncharacteristically without a slide on the point --

THE COURT: I think that's even better at this point.

MR. GAFFEY: -- I think you'd make you happier. Mr. Ridings' testimony essentially was well, everybody's known this company's for sale and my phone hasn't been ringing. It was not -- and I took note of this the first time I ever read that transcript -- it was not, well, we're calling a lot of potential buyers and nobody wants it.

And I think the problem with the formulation Mr. Boies has put forward from a 60(b) perspective is what we are revisiting here, what we are looking at here, is the order that

was actually issued on the record that was actually developed. And the possibility of making assumptions as to what would have been had history been different, is an endless possibility.

To that end, I would note -- and I think I can properly address this, because it's in the record in the motion papers. In the motion papers you will see that Barclays had put into that record a report by a Professor Saunders. And Professor Saunders was going to testify, I think, to exactly that -- what I would think is a let's say formulation. If history had been different, the future would have been different in a way that apparently Professor Saunders thought he could predict.

In other words, Professor Saunders put in an opinion that said if the record had been different, Your Honor would have done this, would have done that and would have been right to do so. Now, that testimony wasn't adduced at trial. But the reason I am addressing it here is I think it needs to be addressed on the motion papers. But I also think the logical fallacy in Professor Saunders' approach is epitomized by Mr. Boies' formulation: if things had been different, would things have been different? Well, that's hypothesis, not fact.

THE COURT: Well, I think he's actually saying something different. I think he's not formulating the question: if things had been different, well then history would have been different. He's saying, if I had been aware of

everything that has been now developed in this record, including the clarification letter -- let's just play the tape forward only a couple of days. Let's say that instead of having had that historical sale hearing that went into the evening, Friday evening into Saturday morning and then led to the weekend of intense activity, that the hearing had taken place instead on Monday, and at that Monday hearing, people would have come into Court with the completed versions of the clarification letter. The lawyers who had participated in the negotiations would have said whatever it is that they could say after several nights without sleep, and they would say, please approve this transaction as it has been modified to reflect discussions that took place over the weekend. And here's a black-line version of the documents. Here are the changes that have taken place.

Virtually every single omnibus hearing in the Lehman bankruptcy case that involves transactional activity -- and there are quite a few such motions that get presented for approval on a monthly basis, involves somebody coming up and saying may I approach; and a black-line version of some document that had been previously in the record is presented to reflect the changes made that morning.

So I can imagine that happening. And the question that's being presented, I think, is a little less of a conundrum than what you're now articulating.

MR. GAFFEY: I see --

THE COURT: I see it more as, if you knew more or less at the same time, everything that had been going on, because we could have a little time shift for about seventy two hours, and it's now the beginning of the week of September 22, and everything that went on could be presented to you, including discussions relating to meetings that took place at Lehman Brothers to mark the book, and it was all presented. I think what Mr. Boies is saying, well of course you would have approved that.

MR. GAFFEY: I hear Mr. Boies saying that. I'm just not sure if there's a logical way to get there. And again, I'll respond by way of example, Your Honor. I take Your Honor's point about possibly the difference between my formulation and your understanding of Mr. Boies' formulation.

But let's take Your Honor's hypothetical. The parties come in on Monday and say, well, we've changed the deal. We have a clarification letter. It's black-lined. Well, first of all, I think the difference between that and what's routinely seen in the Court and at an omnibus hearing, although there's very little that's routine about a Lehman omnibus hearing, is the deadline. The parties came in in the beginning and said we have to get this done. This has got to get done. That's why we have to have that sale hearing on these incredibly truncated timetables. And party after party stood up at the initial

hearing, the sale procedures hearing on the 17th, asking for some relief that -- which the Court determined to go ahead on the schedule the parties proposed.

Well, let's take this to the Monday now. Now, on the Monday -- and now we're in the world of hypothesis -- they come in on Monday and say, well we changed the deal. We've identified -- if you take Mr. Boies' verb -- or added if you take Mr. Gaffey's verb -- these assets through a clarification letter, and we've changed it. Well, does the Court hold another hearing now? This place was crawling with interested parties on the Friday night till after midnight. Does the Court reconvene that? If it does, does it do it on notice? If it does it on notice, how much notice does it give? If it gives only a little bit of notice, are we back to a whole week from Monday?

Now, I raise that as an example, not of whether or not a hearing would -- an additional hearing would have made sense, but to demonstrate that when the order is entered, history is made there. And it is frozen. It's an exercise in hypothesizing what would have happened if, no matter how you look at it.

Would the creditors' committee, having three more days, been able to say, well, wait a minute, what's that 1.9 billion dollars? What's that 769? Why did you change the definition of purchased assets? We need a complete do-over,

because Friday's hearing had nothing to do with the deal that's there now. How much time would that take? And again, I do this by way of example of what I think is the fallacy of -- the logical fallacy of approaching it that way.

I think when a Court is asked to address an order it issued -- when it's asked under Rule 60(b) to address an order that it's issued, it addresses the order that it issued on the record that was made.

One unspoken premise of Mr. Boies' formulation, I think, is the suggestion that somehow it's awkward or it's different for a judge to be asked to revisit his own order. That's what Rule 60(b) is all the time. You don't go back to a new judge and say, Judge Smith entered an order, but because he entered the order and what he had in mind might feature, we're going to go to Judge Jones. You go back to the court that issued the 60(b) order. That's uncontroversial. That's not at all unreasonable. That's what 60(b) is. But 60(b) addresses the record that was made, and there's no do-overs here. There's no, well, let's hypothesize as to the record that would have been made or could have been made and comfort ourselves that it's no harm no foul, it would have come to the same thing.

The logical extension is, and I won't -- the logical extension could be, the Court would have approved anything. I don't think that's so. But the perception and the logical

extension of that, and you're not many steps away is, if I'm going to hypothesize as to what could have happened, you can always hypothesize your way to, well, it would have been the same, the deal -- whatever the new deal is -- would have been done.

THE COURT: I think what distinguishes this proceeding from what may be a more conventional 60(b) setting, and I don't think I'm walking out on a limb in saying that this is perhaps the most unusual 60(b) proceeding in the history of 60(b) proceedings. I doubt that anybody would --

MR. GAFFEY: I think it's just vanilla, lay down your hands, Your Honor.

THE COURT: So we're all navigating some uncharted territory here. And it's something that I've given quite a lot of thought to, including some chambers conferences with counsel, about my role in this in that I'm the witness that nobody called. I was here that entire week and into the evening. And so the circumstances that surround the revisiting of what happened Lehman week create, I think, some unique burdens and responsibilities for the Court.

And without stating too much at this juncture, I think it is publicly known that in the week immediately following that Lehman hearing, I was moderator of a panel at the National Conference of Bankruptcy Judges that took place, I think, on the Thursday after the sale approval hearing. And my panel was

systemic risk. I had been preparing for that panel since January of 2008. And so one of the wildcards in any case assignment is that I happened to be extremely conversant with systemic risk at the time that I received the assignment that week to be what I now am, the Lehman judge.

So would another judge have seen it the same way? Maybe yes, maybe no. The point I make is this: I don't know how you revisit something like this in a thoughtful way other than the proceeding we just had. But it raises some incredibly profound philosophical as well as legal questions. One, for example, is that it is not possible, under any real-world setting, for the information that I have learned in this proceeding to have ever been presented to me in the context of a 363 setting, even if it weren't being presented in the context of the week that was, because such proceedings are necessarily summary and expedited proceedings. And even if they are contested, there's a limit to how much time a transaction can stand in court before the transaction breaks.

So the reality is that you never could have had a thirty-plus day trial to explore every facet of what was going on that week. And so from my perspective, this has been one of the most incredibly fascinating experiences I've ever had as a professional. And without stating anything that you'll view as unduly complimentary to counsel, I think it has been a beautifully tried case and it's been a privilege to be in court

with all of you.

That said, I have a big job in front of me. And I know you're going to help, both in any further remarks made tonight and in the submissions which I will get some time in November -- which, by the way, remind me, what date is that?

MR. GAFFEY: I think -- I don't have the immediate date to mind, Your Honor but --

UNIDENTIFIED ATTORNEY: November 21st is a Sunday so it should be 22nd.

MR. GAFFEY: 22nd of November.

THE COURT: Okay.

MR. GAFFEY: Your Honor --

THE COURT: With that colloquy, we can then finish with what anybody wants to say, and we can then close for the night.

MR. GAFFEY: I had been prepared to rise to report the happy news that none of us had rebuttal, Your Honor. So other than to respond to Your Honor's question, I have nothing to add.

THE COURT: Okay. So I've kept us late.

MR. GAFFEY: Better you than me, Your Honor. Thank you.

THE COURT: Okay. Is there anything more?

MR. BOIES: No, Your Honor.

MR. GAFFEY: No, Your Honor.

ALL: Thank you, Your Honor.

THE COURT: We're adjourned.

(Whereupon these proceedings were concluded at 7:19 p.m.)

C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a true and accurate record of the proceedings.

Lisa Bar-Leib

Digitally signed by Lisa Bar-Leib
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Date: October 25, 2010